TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 52

HARRY A. HAHN, PETITIONER,

vs.

ROSS ISLAND SAND & GRAVEL CO.,
A CORPORATION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OREGON

PETITION FOR CERTIORARI FILED APRIL 21, 1958
CERTIORARI GRANTED JUNE 2, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

No. 225544

HARRY A. HAHN, Plaintiff,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Defendant.

SECOND AMENDED COMPLAINT (Action at Law for Personal Injuries)

Plaintiff complains of defendant, and for cause of action alleges:

I

At all times relevant herein defendant, Ross Island Sand & Gravel Co., was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and is engaged in the business of operating a sand and gravel plant, with its principal place of business at 4129 S.E. McLoughlin Boulevard, in the City of Portland, County of Multnomah, and State of Oregon.

II

At all times relevant herein, there were, and now are, safety regulations duly and legally promulgated and adopted by the State of Oregon Industrial Accident Commission, effective June 15, 1947, which safety regulations are embodied in the "Basic Safety Code of the State of Oregon," Part II, Chapter IV of which relates to fixed ladders and provides, in part, as follows:

"4.5 Fixed ladders shall be firmly secured in place.

• • •

"4.8 Fastenings shall be made to the permanent structure either by building in or by through bolts, rivets, or expansion bolts grouted, leaded, or equivalent."

Said regulations had, and now have, the force and effect of law.

III

On and before March 23, 1955, plaintiff was employed by defendant as an "oiler" at defendant's sand and gravel [fol. 4] plant referred to above; in the performance of his duties as such employee, plaintiff was required to, and did, oil, service and operate power driven machinery in connection with dredging, loading and unloading operations in the course of defendant's business, which work, and the work which plaintiff was performing at, and immediately prior to, the time he was injured as hereinafter alleged, involved risk and danger to plaintiff and to other employees of defendant.

IV

On or about March 23, 1955, at approximately 8:00 p.m., defendant was loading, and was in charge of and responsible for the loading of, a wooden "hopper", used for loading sand and gravel into trucks, onto a barge owned by defendant. The "hopper" was picked up by a crane and was set down on the barge on which it was being loaded whereupon plaintiff, pursuant to orders from defendant, and within the course of plaintiff's employment, attempted to climb a wooden ladder fastened to the side of the "hopper" in order to free it from the crane. The ladder was in two sections such that it was necessary for plaintiff, in order to reach the top of the "hopper" to perform his function in the above-described operation, to climb one section of the ladder to a cross beam one-half way up the "hopper", walk along the cross beam to the second section of the ladder and ascend it to the top of the "hopper." When plaintiff neared the top of the second section of the ladder, it broke away from the frame of the "hopper," to which it was attached, causing plaintiff to plummet over backwards and to fall a distance of approximately 12 feet; plaintiff landed on his back with great force and violence on sand which had previously been loaded on the barge, with the ladder falling on top of him, thereby

proximately causing the injuries and damage to plaintiff hereinafter set forth.

V

Plaintiff's fall and the injuries and damage to him resulting therefrom were the proximate result of, and were [fol. 5] proximately caused by, the carelessness, recklessness and negligence of defendant and the failure of defendant to use every device, care and precaution which it was practicable for defendant to use for the protection and safety of the life and limb of defendant's employees, including plaintiff, without impairing the efficiency of said "hopper", in the following particulars:

(a) In ordering and directing plaintiff to climb up on said "hopper" at a time when the wooden frame thereof, to which said upper section of the ladder was attached, was rotten, decayed and structurally weak and defective.

(b) In failing to see that all wood and other material components of the "hopper" were carefully inspected and tested so as to detect any defects.

(c) In failing to firmly secure upper section of the ladder to the "hopper" by use of through bolts or equivalent means.

(d) In failing to warn plaintiff of the defective condition of the "hopper."

(e) In failing to provide plaintiff with a safe place in which to work.

(f) In failing to use every device, care and precaution for the protection and safety of the life and limb of plaintiff which it was practicable to use without impairing the efficiency of said "hopper" in that it was practicable, and would not have impaired the efficiency of the "hopper," to have replaced the rotten, decayed and structurally weak and defective wooden parts thereof with wood that was not rotten, decayed or structurally weak and defective or with metal, and to have securely fastened said ladder to the

structurally sound portions of the "hopper" by the use of through bolts or equivalent means.

VI

As a direct and proximate result of said accident, and of the negligence of defendant as hereinabove alleged, plaintiff has suffered the following permanent injuries:

[fol. 6] (a) Compression fracture of the first lumbar vertebra;

(b) Compression fracture of the twelfth dorsal vertebra;

(c) Aggravation of a pre-existing arthritic condition;

(d) Strain of the neck;

(e) Multiple bruises and contusions of the right arm. Plaintiff has undergone great physical and mental pain and suffering, and will continue to so suffer in the future. Plaintiff has been, and is, damaged generally in the sum of $50,000.00.

VII

As a direct and proximate result of said injuries, plaintiff has been rendered totally disabled and will be so disabled for an indefinite period of time in the future, and has lost wages, to date, in the amount of approximately $3,900.00, and will continue to lose wages in the future; plaintiff has necessarily incurred medical expenses for treatment by doctors, for x-rays and a hyperextension brace, in the reasonable sum of $342.00, and will necessarily incur additional medical expenses in the future.

VIII

Immediately prior to said accident, plaintiff was 57 years old, and was a healthy, robust, able-bodied man capable of engaging in manual labor; plaintiff had a life expectancy under the Commissioner's 1941 Standard Ordinary Mortality Table of 16.43 years. As a direct and proximate result of said accident, plaintiff's ability to work and perform labor has been permanently impaired.

Wherefore, plaintiff demands judgment against defendant in the sum of $50,000.00 general damages, the sum of $5242.00 special damages, and for his costs and disbursements incurred herein.

Cake, Jaureguy & Hardy, Attorneys for Plaintiff.

[fol. 7] *Duly sworn to by Harry A. Hahn, jurat omitted in printing.*

Plaintiff requests a jury trial.

John H. Buttler, of Attorneys for Plaintiff.

Acknowledgment of service (omitted in printing).

[fol. 8]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Title omitted]

SECOND AMENDED ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Comes now the defendant and for second amended answer to plaintiff's second amended complaint, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I, and that there were and now are safety regulations duly and legally promulgated and adopted by the State of Oregon Industrial Accident Commission effective June 15, 1947 which safety regulations are embodied in the "basic safety code of the State of Oregon",

"4.5 Fixed ladders shall be firmly secured in place.

* * * * * * *

"4.8 Fastenings shall be made to the permanent structure either by building in or by through bolts, rivets, or expansion bolts grouted, leaded, or equivalent."

but the defendant does not admit that said safety regulations are applicable to the matter here in question.

II.

The defendant further admits that on March 23, 1955, the plaintiff was employed by the defendant as an oiler at defendant's sand and gravel plant and admits that on March 23, 1955 a wooden hopper was to be removed from a barge and in the course of said removal the plaintiff was climbing a ladder on the side of said hopper and fell and incurred some injury although the defendant denies the specific allegations of injuries made by the plaintiff.

[fol. 8A] III.

The defendant further admits that the plaintiff was 57 years old and appeared capable of engaging in manual labor but the defendant denies each and every other allegation of plaintiff's second amended complaint and the whole thereof.

For a Further and Affirmative Answer and Defense the defendant alleges as follows:

I.

That on March 23, 1955 at the time the plaintiff was injured the plaintiff was employed by the defendant and was working on a barge; that the plaintiff at the time of his injury was not a master or a member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net.

II.

That said barge was upon, and plaintiff's injuries occurred upon a portion of the Willamette River in the State of Oregon lying between what is known as Ross Island and Hardtack Island.

III.

That the defendant has secured the payment of compensation under the Longshoremen and Harbor Workers' Compensation Act of the United States (33 U.S.C.A. Sec. 890) in a manner provided for in said Act.

IV.

That the sole and exclusive liability of the defendant for any injuries for which the plaintiff may have incurred as alleged in plaintiff's second amended complaint is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act.

Wherefore, the defendant prays for judgment herein.

Mautz, Souther, Spaulding, Denecke & Kinsey,
Attorneys for Defendant.

[fol. 9] Acknowledgment of service (omitted in printing).

[fol. 10]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Title omitted]

REPLY TO SECOND AMENDED ANSWER TO SECOND AMENDED COMPLAINT

Comes now plaintiff and for his reply to defendant's further and affirmative answer and defense contained in its second amended answer to plaintiff's Second Amended Complaint, admits, denies and alleges as follows:

I

Answering paragraph I, plaintiff admits the same.

II

Plaintiff denies each and every other allegation, matter and thing therein contained and the whole thereof.

Wherefore, plaintiff prays for judgment as set forth in his Second Amended Complaint.

Cake, Jaureguy & Hardy, Attorneys for Plaintiff.

[fol. 11]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Title omitted]

Bill of Exceptions

Plaintiff, Harry A. Hahn, tenders this, his bill of exceptions herein, as follows:

Be It Remembered that the above-entitled action came on regularly for trial in the above-entitled court on the 8th day of February, 1956, before the Honorable James R. Bain, Judge of the above-entitled court, plaintiff appearing in person and by Dwight L. Schwab and John H. Buttler, of Cake, Jaureguy & Hardy, his attorneys, and the defendant appearing by one of its officers and by Arno H. Denecke, of Mautz, Souther, Spaulding, Denecke & Kinsey, its attorneys. A jury was duly impanelled and sworn to try the action, whereupon the trial proceeded, and with adjournment from time to time continued to and including the 10th day of February, 1956.

There is attached hereto and made a part hereof to all intents and purposes whatsoever a transcript of all of the evidence which was offered, excluded or received at the trial, all motions, objections, stipulations and exceptions made during the trial, all rulings and comments of the court made during the trial, but said transcript of the proceedings does not include any instructions given, or requested to be given, to the jury by the court, to the giving of which, or the failing to give which, instructions no exceptions were taken by either party. Also attached hereto are all of the exhibits referred to in said transcript of proceedings, and said exhibits are all of the exhibits offered, excluded or received in evidence, and they are by [fol. 12] this reference thereto incorporated herein and made a part hereof.

Said transcript of proceedings does not expressly state that each of the parties stipulated to the statements dictated into the record by Mr. Buttler and appearing on pages 7, 96 and 97 of the transcript of proceedings; in fact,

however, counsel for the respective parties stipulated to all of said statements. Said transcript of proceedings does not indicate that Defendant's Exhibit 1 and plaintiff's Exhibits A, B, C and D were received in evidence; in fact, however, each and every one of said exhibits was offered into evidence and admitted and received without objection.

After the parties rested their cases, on the 10th day of February, 1956, defendant moved for a directed verdict in its favor; the court was of the opinion that the motion should be granted, but, at the request of counsel for plaintiff, and pursuant to ORS 18.140, decided to submit the case to the jury with leave to the defendant to move for judgment in its favor if the verdict was otherwise than would have been directed. Said motions and the court's rulings thereon were as follows:

> Mr. Denecke: The defendant moves the Court to direct a verdict for the defendant on the grounds and for the reason that the evidence in the case shows that the plaintiff was injured on the navigable waters of the United States and that the plaintiff is otherwise within the purview of the Longshoremen and Harbor Workers' Compensation Act by reason of the fact that he was not a master or a member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons, and that the defendant had secured the payment of compensation under the Longshoremen and Harbor Workers' Act in a manner provided for in said Act, and that said Act provides that the sole and exclusive liability of the defendant for any injuries which the plaintiff may have incurred is that liability provided for under the Longshoremen and Harbor Workers' Compensation Act; and furthermore that the Compensation Act of the State of Oregon is not applicable because of the work in which the plaintiff was engaged at the time and because the injury occurred upon the navigable waters of the United States.
>
> • • • • • • •
>
> "The Court: Gentlemen, after listening to your arguments and reading your authorities and studying them some more, and listening to the testimony in this case,

[fol. 13] the Court is of the opinion that this accident happened on navigable waters of the Willamette River.

"The Court is further of the opinion that the uncontradicted testimony shows that the defendant Ross Island Sand & Gravel Company was engaged in interstate commerce, and I fail to see where it comes within the twilight zone following the Martinson case. I think Mr. Hahn's remedy is under the Longshoremen and Harbor Workers' Act, so I am going to allow the motion for directed verdict and allow an exception.

"Mr. Schwab: Your Honor, we would like to have the matter submitted to the jury under the rule so we can get a jury determination.

"The Court: I will allow them to present the case to the jury with the understanding if the verdict comes in for the plaintiff I will set it aside and grant a verdict for the defendant, and allow an exception."

After counsel for both parties had made their respective arguments to the jury and the court had instructed the jury as to the law of the case, the jury retired to deliberate, and on the 10th day of February, 1956, the jury returned into open court its verdict, as follows:

VERDICT—February 10, 1956

"We, the jury, duly impanelled and sworn to well and truly try the above-entitled cause, do find our verdict in favor of the plaintiff, Harry A. Hahn, and against the defendant, Ross Island Sand & Gravel Co., a corporation, and assess plaintiff's general damages in the sum of $34,000.00 and his special damages in the sum of $4,242.00.

"Dated this 10 day of February, 1956.

"Marion J. Siders
Foreman"'

and said verdict was received as and for the verdict of the jury in this cause and was filed herein.

* * * * * * *

[fol. 14]

"In the Circuit Court of the State of Oregon
For the County of Multnomah

Motion for Judgment—Filed February 13, 1956

"Comes now the defendant Ross Island Sand & Gravel Co., a corporation, and moves the Court for an order setting aside the verdict rendered and entered in the above entitled action in favor of the plaintiff and against the defendant, in the event that the Court determines that there was a valid verdict duly rendered and entered on the ground and for the reason that defendant's timely motion for a directed verdict for the defendant was granted by the Court and ought to be granted but the Court, at the request of the plaintiff, submitted the case to the jury with leave to the defendant to move for a judgment in defendant's favor if the verdict was otherwise then as would have been and was directed.

"In addition to the grounds and reasons above stated this motion is based upon the further grounds and reasons as were stated at the time defendant made its motion for a directed verdict and upon which grounds and reasons the Court granted the defendant's motion for a directed verdict. such further grounds and reasons being that at the time the plaintiff was injured he was upon a barge and said barge was upon and the plaintiff's injuries occurred upon the navigable waters of the United States, that is a portion of the Willamette River in the State of Oregon lying between what is known as Ross Island and Hardtack Island. Plaintiff at the time of his injury was not a master, member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net; that the defendant at the time of the injury had secured the payment of compensation under the Longshoremen & Harbor Workers' compensation Act of the United States (33 U.S.C.A. Sec. 890) in a manner provided for in said Act; that the sole and exclusive liability of the defendant for any injuries for which the plaintiff may have incurred was alleged in plaintiff's second amended complaint

is that liability provided for under the said Longshoremen & Harbor Workers' Compensation Act.

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY
Attorneys for Defendant"

* * * * * * *

"IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Title omitted]

JUDGMENT—February 14, 1956

[fol. 15] "The above entitled cause came on regularly for trial in the above entitled court on the 8th day of February, 1956, before the undersigned Judge of said Court, plaintiff appearing in person and by his attorneys, Dwight L. Schwab and John H. Buttler of Cake, Jaureguy & Hardy, and defendant appearing by one of its officers and by its attorney Arno H. Denecke of Mautz, Souther, Spaulding, Denecke and Kinsey; a jury was duly empanelled and sworn; counsel for the respective parties made their opening statements to the jury; evidence was introduced by the respective parties, and stipulations of fact were made by the respective parties, and after the respective parties had rested their cases, counsel argued the cause to the jury; thereupon the jury was instructed by the Court as to the law of the case, and thereafter, on the 10th day of February, 1956, the jury retired to deliberate on its verdict; and thereafter, on the 10th day of February, 1956, the jury returned its verdict in open court, James R. Bain, one of the Judges of the above entitled Court presiding, said verdict being as follows:

"We, the jury, duly empanelled and sworn to well and truly try the above entitled cause, do find our verdict in favor of the plaintiff, Harry A. Hahn, and against the defendant, Ross Island Sand and Gravel Co., a corporation, and assess plaintiffs general damages in the sum of $34,000 and his special damages in the sum of $4,242.

"Dated this 10th day of February, 1956.

"Signed—MARION J. SIDERS
Foreman."

"Now, Therefore, based upon said verdict of the jury,

"It Is Hereby Ordered and Adjudged that the plaintiff have and recover of and from the defendant, Ross Island Sand & Gravel Co., a corporation, the sum of $38,242.00 and for his costs and disbursements incurred herein, taxed in the sum of $.....; and that execution issue therefor.

"Dated this 14th day of February, 1956.

"James R. Bain
Judge"

and thereafter plaintiff's cost bill in the amount of $63.19 was duly served, filed and allowed.

Among the proceedings thereafter had to which objections were made and exceptions taken by plaintiff and allowed by the Court, together with sufficient explanatory matter to explain the rulings and errors complained of, were the following:

Exception No. 1

On the 15th day of February, 1956, defendant served and filed its Motion for Order Setting Aside Verdict and Judgment and for Judgment for Defendant Notwithstanding the Jury Verdict as follows:

[fol. 16]

"In the Circuit Court of the State of Oregon
For the County of Multnomah

Motion for Order Setting Aside Verdict and Judgment and for Judgment for Defendant—Filed February 15, 1956

"Comes now the defendant Ross Island Sand & Gravel Co., a corporation, and moves the Court for an order setting aside the verdict rendered and entered in the above entitled action in favor of the plaintiff and against the defendant, in the event that the Court determines that there was a valid verdict duly rendered and entered, and setting aside the judgment entered thereon in favor of the plaintiff and against the defendant, on the ground and for the reason that defendant's timely motion for a directed verdict for the defendant was granted by the Court and ought to be

granted and should have been granted, but the Court, at the request of the plaintiff, submitted the case to the jury with leave to the defendant, to move for a judgment in defendant's favor if the verdict was otherwise then as would have been and was directed.

"In addition to the grounds and reasons above stated this motion is based upon the further grounds and reasons, as were stated at the time defendant made its motion for a directed verdict and upon which grounds and reasons the Court granted the defendant's motion for a directed verdict, that at the time the plaintiff was injured he was upon a barge and said barge was upon and the plaintiff's injuries occurred upon the navigable waters of the United States, that is a portion of the Willamette River in the State of Oregon lying between what is known as Ross Island and Hardtack Island. Plaintiff at the time of his injury was not a master, member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net; that the defendant at the time of the injury had secured the payment of compensation under the Longshoremen & Harbor Workers' Compensation Act of the United States (33 U.S.C.A. Sec. 890) in a manner provided for in said Act; that the sole and exclusive liability of the defendant for any injuries for which the plaintiff may have incurred was alleged in plaintiff's second amended complaint is that liability provided for under the said Longshoremen & Harbor Workers' Compensation Act.

"MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY
Attorneys for Defendant"

* * * * * * *

"IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 225-544

"HARRY A. HAHN, Plaintiff,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Defendant.

JUDGMENT—February 16, 1956

[fol. 17] "This matter came before the Court on the motion of the defendant for an order setting aside the verdict rendered in the above entitled action in favor of the plaintiff and against the defendant, and setting aside the judgment thereon and for a judgment in favor of the defendant; and

"The Court having granted defendant's timely motion for a directed verdict for the defendant, but at the request of the plaintiff, having submitted the case to the jury with leave to the defendant to move for a judgment in his favor if the verdict is otherwise than would have been directed, and the verdict being otherwise than was directed by the Court and the Court hearing further argument and finding that the plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. Sec. 901, et seq), and the Court being fully advised in the premises, therefore:

"IT IS CONSIDERED, ORDERED AND ADJUDGED that the motion of the defendant for an order setting aside the verdict rendered and entered in the above entitled action in favor of the plaintiff and against the defendant, for an order setting aside the judgment entered thereon, and for a judgment in favor of the defendant be and the same is hereby granted; and the verdict and judgment in favor of the plaintiff and against the defendant be and hereby are set aside and held for naught; all on the ground that the plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. Sec. 901, et seq.); and

"IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED on said ground that the plaintiff take nothing against the defendant Ross Island Sand & Gravel Co. by reason of this action and that the defendant Ross Island Sand & Gravel Co. have judgment against the plaintiff Harry A. Hahn and that the defendant have judgment against the plaintiff for its costs and disbursements incurred herein taxed at $..... and that execution issue therefor.

"Dated this 16 day of February, 1956.

"JAMES R. BAIN
Judge"

The foregoing bill of exceptions is hereby presented and tendered by the plaintiff on this 13th day of April, 1956, with the request that it be settled, approved and allowed by the Court as the bill of exceptions herein.

Cake, Jaureguy & Hardy, Attorneys for Plaintiff.

[fol. 18]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 225-544

Harry A. Hahn, Plaintiff,

vs.

Ross Island Sand & Gravel Co.,
a corporation, Defendant.

Transcript of Proceedings—February 8, 1956

Be It Remembered That the above-entitled cause came regularly on for trial before the Honorable James R. Bain, Judge presiding in Department No. 3 of the above-entitled Court, and a jury, commencing on Wednesday, February 8, 1956, at the hour of 9:30 o'clock A. M.

APPEARANCES:

Mr. Dwight L. Schwab and Mr. John H. Butler, of attorneys for plaintiff.

Mr. Arno H. Denecke, of attorneys for defendant.

(Whereupon, prior to the impaneling of the jury, the following proceedings were had in chambers:)

[fol. 19] Proceedings

The Court: I think the changes in the pleadings, as far as the Second Amended Complaint is concerned, it's just changes in the injuries and damages; isn't that right?

Mr. Buttler: Yes. It alleges in addition to what was in the prior addition on page 4, it alleges a compression fracture of the twelfth dorsal vertebra, which was not included in the first complaint. That was an oversight, it just alleges the first lumbar, and we raise the amount of the general damages.

The Court: $342. Any objections?

Mr. Denecke: No objections.

The Court: It will be received and filed. How is your answer; did you file an amended answer?

Mr. Denecke: Yes, but I am going into it a little more on the Longshoremen and Harbor workers Act.

The Court: Any objections?

Mr. Schwab: We have no filing of it. We have no objection to the filing of it, we want certain portions of it stricken.

The Court: The Amended Answer to the Second Complaint will be filed. What is your motion?

Mr. Schwab: On Page 2 of the Further Affirmative Answer and Defense, paragraph II, Line 18, move to strike the words, "the navigable waters of the United States, that is", on the ground that that states a legal conclusion and isn't a pleading or ultimate fact.

[fol. 20] The Paragraph III, we move to strike the entire paragraph on the ground that it's pleading of a legal conclusion.

Paragraph V, as pleading a conclusion, we move to strike the entire portion of Paragraph V.

The Court: Well—you got a question, John?

Mr. Buttler: Well, as far as Paragraph II, "upon the navigable waters of the United States, that is", that's taken right from the statute there, and it's thought by the defendant necessary, in order to properly plead this defense, otherwise the defendant would be open to the possible contention that they didn't plead the facts, which it would give them under the Longshoremen and Harbor Workers Act.

The Court: That was starting at Line 18, where it's "navigable waters of the United States, that is"?

Mr. Schwab: It would be—it's my contention that they can plead the factual situation as to where this portion of

property is, that we are talking about, and then it would be up to the Court to decide whether that is navigable waters of the United States, but to plead it in here, is to just plead a legal conclusion.

The Court: With the understanding that you agree that the defendant has raised the question of whether or not it happened on navigable water, I will allow the motion to strike that part of Paragraph II, "navigable waters of the United States, that is", so that the Paragraph II will read, "That said barge was upon, and plaintiff's injuries occurred upon, a certain portion of the Willamette River [fol. 21] in the State of Oregon lying between what is known as Ross Island and Hardtack Island." Now, what is the next motion?

Mr. Schwab: All the rest of the Answer, as far as that goes, Paragraphs III, IV and V. Now that again is pleading a conclusion. That is a matter that the Court will determine after hearing the evidence, and it's also pleading evidence, as far as that goes. It is something that is not required for him to plead. The question has been raised, we have agreed that they have raised the question that the Longshoreman and Harbor Worker's Act applies here, and this is all extraneous, and he is pleading a conclusion.

(Further discussion off the record.)

[fol. 22] February 8, 1956
2:00 P. M.

(Further proceedings were had in chambers as follows:)

Mr. Schwab: On that Paragraph III of the Further Answer and Affirmative Defense, all III, IV and V are subject to be stricken, that III is particularly the worst, and that it's not necessary, among other reasons that I stated this morning, it's also redundant with V.

Mr. Denecke: I won't agree to the striking, but I have no argument.

The Court: The Court is going to allow plaintiff's motion to strike all of Paragraph III, and deny the motion to strike Paragraphs IV and V.

Mr. Denecke: If this is agreeable, I will submit a new Answer.

The Court: Then you gentlemen will have a Reply in, won't you?

Mr. Schwab: We ask permission to file this Reply to the Amended Answer.

Mr. Denecke: Well, in the first paragraph there—of course, we have no quarrel with that, it's the Further Separate Reply.

Mr. Schwab: I assume you have no objection to our filing, but you want to move against it?

Mr. Denecke: That's right.

The Court: The Reply of the Amended Answer will be received and filed. In view of the fact that I struck out [fol. 23] Paragraph III of the Further and Separate Answer and Defense, so the Further and Separate Answer of Defense is going to set forth, the plaintiff was employed by the defendant, was working on the barge, not being a master or member of the crew, or engaged by the master to load or unload, repair any small vessel under 18 tons, and secured compensation under the Longshoremen and Harbor Worker's Act—I will deny the motion to strike the paragraph on the Further Separate Answer. I will allow the motion to strike Paragraph I of the Reply to the Further and Separate Answer.

Mr. Denecke: Just for the record, you knew what I was getting at. I move to strike Paragraph 1 of the Further and Separate Reply to the Amended Answer on the ground that it's irrelevant and immaterial.

The Court: Motion will be allowed and exception allowed.

Mr. Schwab: I would like to move, at this time, would the Court direct Counsel, in the interrogation of the jury on voir dire and in the conduct of the taking of testimony and argument to the jury, that no mention be made of the Harbor Worker's Act? I think if he gets the Harbor Worker's Act in, I think it would be just as proper for us to mention that there is liability insurance in this case. I see no reason for it to be mentioned.

The Court: All right, that's fair enough. This is Exhibit number 1, Defendant's Exhibit number 1.

(Document referred to was marked Defendant's Exhibit 1 for Identification.)

[fol. 24] Mr. Buttler: At all times relevant herein, Ross Island Sand & Gravel Company was the owner of record title in fee simple of the area enclosed by red pencil on Defendant's Exhibit 1, whether the land is covered by water or not, all of which property was treated as a single parcel in the original patent from the United States of America to Rebecca F. Ross, et al, dated May 5, 1873, a certified copy of which patent is marked Plaintiff's Exhibit A. Said property was acquired by defendant as a single entity by deed dated July 1, 1926, a certified copy of which deed is marked Plaintiff's Exhibit B, with the exception of certain small portions of land shown on Defendant's Exhibit 1, as not covered by water and which are immaterial to the issues in this case.

Defendant does not have, and has never had, a permit from any governmental authority, either Federal or State, to conduct its dredging operations between Ross Island and Hardtack Island, and does not pay the State of Oregon any royalties for sand and/or gravel removed therefrom.

Defendant has conducted dredging operations between the two islands, including the areas between high and low water marks for many years.

A large portion of the area between the two islands was originally dry land at least at low water and has been dug away by the defendant in its dredging operations.

Mr. Denecke: So stipulated.

(Jury empaneled and sworn; opening statements were made.)

[fol. 25] February 9, 1956
9:40 A. M.

(The following proceedings were had in open court in the presence of the jury.)

The Court: Call your witness.

Mr. Schwab: Call Mr. Hahn, your Honor.

HARRY A. HAHN was thereupon produced as a witness in his own behalf and, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schwab:

Q. Now, your name is Harry A. Hahn, is it?
A. That's right.
Q. And you are the plaintiff in this case of Hahn versus Ross Island Sand & Gravel Company?
A. Yes.
Q. Where do you live?
A. 914 Southeast 21st.
Q. In Portland?
A. In Portland.
Q. How long have you lived in Portland?
A. Well, I have lived here since about '41.
Q. Do you have a family?
A. Well, just the wife and I now, their (sic) all married.
Q. I see. You did have some, but they are all gone now?
A. Yes, that's right.
Q. On March 23, 1955, Mr. Hahn, were you working for [fol. 26] the defendant, Ross Island Sand and Gravel Company?
A. Yes.
Q. About when did you start?
A. Do you mean when I started to work that day?
Q. About what date did you start?
A. About the 15th, I imagine.
Q. Of March?
A. March.
Q. Of '55?
A. Yes.
Q. Now, generally speaking, Mr. Hahn, what type of work have you been doing for the last number of years?
A. Construction work.
Q. And roughly what kind of work do you do in connection with the construction work?
A. Oh, grease shovels, and help repair them and stuff like that.

Q. Is there any title for the general job that you do; do they call you anything in particular?

A. Oiler.

Q. They call you an "Oiler"?

A. Yes.

Q. Now, in connection with the job as oiler, in connection with machinery and so on, would you describe in some detail what your duties are?

A. Well, you usually grease the shovel, and if any break-downs, you help repair them, and things like that—change cable and things like that, you change cables.

[fol. 27] Q. Now, when you talk about a shovel, what do you mean by that?

A. Well, it's one of these shovels that dig up dirt and stuff like that, move dirt and gravel and stuff.

Q. Well, is a machine like that called a dredge or crane?

A. Well, some of them are called dredges and some are called shovels. There are different types.

Q. Now, in connection generally with working around the shovels, if there was any break-downs, you would help repair it; if there were any cable breaks, you helped repair that?

A. Yes.

Q. Let me ask you this; generally as you performed your duties as an oiler, would you have any particular lifting work to do, from time to time?

A. Oh, yes. You had your fuel to put in these shovels, like gas and oil, and you had to change your oils and gas, things like that, you had these heavy cans to lift.

Q. How about on the repairing end of it, if you had a break-down, say, on the cable?

A. Well, if you had a break-down, it all depended on what broke, in what part of the drum. If you had a shaft broke, you had to pull the shaft, and that was all.

Q. How about the cable—by shaft, is that something else?

A. Well, the shaft that runs the drum that the cables are on.

Q. Well, suppose you had a break in the cable?

[fol. 28] A. Well, you'd have to take the old one off and put a new one on.

Q. Now, these cables, are they light or heavy?

A. They are heavy.

Q. And you speak of cable, are you referring to the shovel cable that runs up to the top——

A. Of the boom, down to the ground and onto the bucket and back to the drum.

Q. Now, these break-downs and repair jobs that you are talking about, did they happen with some regularity or frequency, or would they just happen very occasionally?

A. Oh, they just happened very occasionally, but it all depended on what type of shovel it was. If it was an old one, it happened quite often.

Q. Well, what would you say on the average; would you have repair jobs to do once a week or twice a week?

A. About once a week you went over and repaired some things, you know, on a Saturday or something, when we wasn't working.

Q. Now, in connection with your job with this machine, would you be able to hold a job as an oiler if you were not able to perform this repair work, let us say?

A. No.

Q. Would you be able to perform the job if you were not able to heave or lift these gas cans or oil cans or tanks?

A. No, you wouldn't.

Q. What could or would happen if you were not able to do [fol. 29] that kind of job?

A. Well, you just wouldn't stay there; you wouldn't last.

Q. You would not be able to keep the job; is that right?

A. That's right.

Q. How long have you worked, Mr. Hahn, as an oiler?

A. Since 1937.

Q. Has that been your continuous type of work since then?

A. Yes.

Q. Now, you had only worked out there at Ross Island——

A. For six days.

Q. Well, it was from about the 15th—about the 15th to the 23rd?

A. Yes, sir.

Q. And I guess a weekend came in there, did it not?

A. Yes, I guess—yes, it did.

Q. Now, in connection with your duties, would you work for quite a number of companies over a period of a year or would you work steadily for one company?

A. Well, some years, you work for a lot of companies, and then other years, you just work for one company, but the last three years, I have only had three employers—two employers.

Q. You mean outside of Ross Island?

A. Well, outside of Ross Island?

Q. Yes, in other words, before you worked for Ross Island at the time of this accident, you had had just two employers for the last two years?

[fol. 30] A. That's right.

Q. Well now, prior to that, had you had quite a number of different employers?

A. Yes. In this work, you just take a job where you can get it. Some of these last quite a while and some of them don't last as long.

Q. It depends on what type of work is being done?

A. That's right.

Q. Are you a member of a union?

A. Yes.

Q. Which union?

A. Engineers.

Q. What is the full name of the union?

A. Hoisting Engineers.

Q. They are over here in the Labor Temple?

A. Over here in the Labor Temple, 701.

Q. And what procedure is used in connection with you and other members of the union in obtaining jobs?

A. Well, when you are out of a job, you report to the union and they send you out on jobs.

Q. Your name goes on a list?

A. Your name goes on a list, and they call you when they have a job come up, and they give you a slip and you go out on the job.

Q. Is that the usual way for the employment of people doing the kind of work you do?

A. Yes.

Q. You are permitted to go out, let us say, and contact [fol. 31] individual employers looking for jobs?

A. Well, they don't want you to do that, but it has been done.

Q. But, as I understand it, the usual way is to work through the union?

A. Yes, through the union.

Q. Could you tell us who the business agent is, over at the union?

A. Yes, Herb Shell.

Q. Well now, you told us something about what your general duties are, or have been, your general type of work, let us get down to your job that you had for Ross Island.

A. Yes.

Q. Now, you first reported to work for them on the 15th of March, 1955?

A. Yes.

Q. And was that job obtained in the way you have described through the union?

A. Yes, the union sent me over there.

Q. And when you got there, you reported to the company and they told you what your duties were going to be?

A. Yes, that's right.

Q. Now, what time did you report for work on the 15th of May?

A. 2:00 o'clock in the afternoon.

Q. Pardon me?

A. 2:00 o'clock in the afternoon.

[fol. 32] Q. 2:00 o'clock in the afternoon. Let us see, the 15th of March—did your job take five or six days a week?

A. Five days a week.

Q. And how late did you work in the evening?

A. Well, we worked seven and a half hours for eight.

Q. Well, what time would that get you off the job then?

A. Well, that would get us off—what would that be? About eleven—about ten-thirty—eleven-thirty, wouldn't it be?

Q. Well, from 2:00, and seven and a half hours would be around 9:30.

A. Well, there would be a half hour for lunch there.

Q. Which would make it 10:00 o'clock?

A. Yes, about 10:00.

Q. 10:00 o'clock at night?

A. Yes.

Q. All right. Now, when you reported to Ross Island the first day, on the 15th of March, what duties did they assign you?

A. They—well, that's what they call a derrick over there, picking gravel out of the river and loading it on the barge. My duties was to move this barge—this barge that they was loading with this raw material, back and forth so they could spread it even. Of course, I was over there—I had a big winch to move this barge with.

(Photograph referred to was marked Plaintiff's Exhibit 4 for Identification.)

OFFER IN EVIDENCE

Mr. Schwab: Now, I am going to offer Plaintiff's Exhibit 4 in evidence, your Honor.

[fol. 33] Mr. Denecke: No objection.

The Court: It will be received. What is it, a picture?

Mr. Schwab: Yes, it's an aerial photograph.

By Mr. Schwab:

Q. Now, Mr. Hahn, I am going to show you Plaintiff's Exhibit 4, and I will ask you to take a look at that and tell generally what that shows.

A. Well, that shows the lagoon in there where they was working.

Q. Well, first, let me ask you this; you say the "lagoon in there", is that Ross Island shown on the picture there?

A. Well, this could be there where their crushing plant is setting there.

Q. I don't mean the Ross Island Sand & Gravel, I mean is that Ross Island setting there in the river there?

A. Well, I don't know whether you call it Ross Island or Hardpan or what.

Q. Hardtack?

A. Hardtack.

Q. Yes. Well——

Mr. Denecke: Excuse me, your Honor, if it might help here, the one closest to the East side is Hardtack, and this one (indicating) is Ross; is that right?

The Witness: It probably is that this is Ross Island.

By Mr. Schwab:

Q. I will show you Defendant's Exhibit 1, Mr. Hahn, which is a map showing the City of Portland. I will call your attention here to the Willamette River, with an indication of Ross Island and Hardtack Island——

[fol. 34] A. Yes.

Q. —and this is the aerial photograph, which is Exhibit 4——

A. Yes.

Q. Just for the purpose of orienting you.

A. Well, Ross Island Bridge would be over here (indicating) wouldn't it—oh, down here, the Sellwood Bridge over in there (indicating).

Q. Yes. All right. This is the area down here that we are talking about, in this general vicinity here. Now, Mr. Hahn, calling your attention to Ross Island here, and Hardtack Island here (indicating), would you state where, in relation to those two islands indicated on Exhibit 1, the work that you were doing was carried on?

A. Right in here (indicating).

Q. You pointed there (indicating), do you mean in the area between the two islands?

A. Well, that's where the floating derrick was.

Q. Well now, you stated that this barge that you were on was dredging up sand?

A. Yes.

Q. And gravel from the——

A. Yes, that's where that dredge was dredging, loading them barges.

Q. Well now, this dredge that you were working on, was it on the water or on the land?

A. It was on the water.

Q. Now, was this water that you were working on located [fol. 35] between Ross Island and Hardtack Island?

A. Yes.

Q. The map here, Exhibit 1, indicates some water in between those two islands. Now, is that where your work was carried on?

A. Yes. Well, it was carried on up—right in through here, but I don't recall of that water going in between them two islands.

Q. Well, let me ask you this: was there a lagoon that you were——

A. Yes, there was a lagoon in there.

Q. And was that surrounded except on one end by the land?

A. No, sir, the land came right around like a horseshoe.

Q. In other words, it was open on one end?

A. Yes.

Q. And was all your work carried on inside of the horseshoe?

A. Yes.

Q. All right. Now, did you ever work outside that horseshoe, possibly over on the Willamette River itself?

A. Oh, no.

Q. During all the time you were there?

A. Yes. About the only time we left that rig was to go over to the plant and do some work around the plant.

Q. By "plant", you mean the plant up on McLaughlin Boulevard, or you mean at the rock crusher?

A. At the rock crusher.

Q. Well, that rock crusher was in that same horseshoe [fol. 36] area, wasn't it?

A. Yes.

Q. All right, you can sit down again. If it's all right, your Honor, I will just pass this aerial photograph around so that the jurors can see it. Now, for the purposes of the record, we have put a little piece of paper with some stickum paper over it on Ross Island itself, and since Hardtack is smaller, rather than put the tape and the paper right on Hardtack, we have put it down here in the corner, but Ross Island is up toward the top of the Exhibit, and we are talking about Exhibit 4, and immediately toward the bottom of the picture from Ross Island is Hardtack Island. Now, so that you jurors will know just what we are talking about, this is Ross Island, right where the word, "Ross"

appears, and this is Hardtack down here, because there was not room enough up there, and then you will notice that there was a land connection at this end of the Island, which would be to the left side of the Exhibit.

Would you mark these, please?

(Photographs referred to were marked Plaintiff's Exhibits 5 to 9 for Identification.)

By Mr. Schwab:

Q. Now, Mr. Hahn, you stated that you were out there in this lagoon between Hardtack and Ross Island, out on the water in connection with your regular duties?

A. Yes.

[fol. 37] Q. Now, would you explain just how the company, your employer, would get the sand and gravel that they were after? Now, if you don't understand what I mean; were they getting the sand and gravel from under the water?

A. Yes.

Q. And what would they use to get that sand and gravel from under the water?

A. Well, they used a clam-shell bucket.

Q. And what was that attached to?

A. That was attached to the rig—the shovel, and just go down and pick up a bucket full and bring it up and dump it on the barge.

Q. In other words, the jaws would open up?

A. Yes, it just goes like this (indicating).

Q. The jaws would open up and the bucket would go down to the bed, and then they would close on a load of sand and gravel, and the bucket would be picked up and dumped on the barge; is that correct?

A. Yes, sir, that's right.

Q. Now, this rig to which this bucket was attached, what did you call that again?

A. I called it a shovel, but some of them call it a dredge.

Q. All right. I think a dredge is what would be a more common discription (sic) of it.

A. Yes.

Q. This dredge, was that on a barge too?

A. Yes, that was on a barge.

[fol. 38] Q. And how was this barge anchored out there, was it anchored, or just what was the situation?

A. Well, it was anchored with some cables, one out to the island, out where the dirt was, and they had some "dead men" buried there, and they had these cables hooked on there, and that's the way they moved it.

Q. Well, you are talking about a "dead man", what is a "dead man"? Is that a piling driven in the bottom?

A. Well, you can call it a bottom, but it's usually done—they go out there and they bury a big timber, oh—they bury it down about 12–14 feet, and they hook this cable on, and that cable is brought back where your derrick is, and it's hooked on—which they have another winch on the other side, and it's hooked on to the winch, and they have three of them like that. They have one on the tail and one up at the head end and one over to one side.

Q. All right. Now, you have a barge out there with a derrick on it—not a derrick—what do you call it?

A. Crane.

Q. With a dredge on it?

A. Dredge.

Q. All right. And this was just setting out there in the lagoon?

A. Yes.

Q. And it was tied by means of cables to some—what you called dead men; is that right?

A. That's right.

[fol. 39] Q. And these dead men were big pilings that were driven into the bottom of the lagoon there?

A. Yes.

Q. And then the cables that were used to lash the barge to the pilings were attached to a winch on the barge; is that correct?

A. That's right.

Q. And what was the purpose of having the cables attached to a winch on the barge?

A. Well, after they dig so long in one spot, they run out of gravel, they have to mover (sic) back a little bit to get some more material.

Q. And this winch then, would that be used for the purpose of moving the barge?

A. To move the barge.

Q. In other words, the cable which was attached to the dead men would be run from the drum to the winch, which would move the barge one way or the other; is that correct?

A. That's correct.

Q. Now, was this winch power driven?

A. Yes.

Q. And it had how many drums on it?

A. Three.

Q. And did these drums have rather heavy cable——

A. Yes.

Q. —on the drums?

[fol. 40] A. Yes.

Q. That was used to attach the—that is, the cable was attached to these dead men?

A. Yes, just about a two inch cable, two inches around.

Q. Is that pretty large size cable?

A. That's a pretty good size cable.

Q. Steel cable, was it?

A. Yes.

Q. Now, you say that the winch itself was power driven?

A. Yes.

Q. And who ran it?

A. Well, you mean to move——

Q. Who ran the winch?

A. To move the derrick?

Q. Yes.

A. The operator ran that.

Q. I mean the winch that was used to move the barge back and forth.

A. Well, the one we used to load the gravel on, I moved that.

Q. Oh, you moved the one that you loaded the gravel on?

A. Yes.

Q. Well, we better get to that. The barge, the one we have been talking about, is the one that has the dredge on it; is that right?

A. Yes.

Q. Now——

[fol. 41] A. Right alongside of it.

Q. Right alongside of it?

A. Yes.

Q. And was that also attached to some dead men?

A. No, that wouldn't be attached to the dead men, because they would have to haul that away, that would just be brought in with a tow-boat, and pulled up alongside of you, and you would put these lines to it from another winch from the other side, and you would put these three lines on it and pull the barge in where you want it.

Q. You mean you pull the barge in toward the dredge?

A. Yes.

Q. And was that the same as the winch that was on the barge that had the dredge on it?

A. Well, yes, they are both on the same barge as the dredge is on, they got two winches on there.

Q. On the barge that the dredge is on?

A. Yes.

Q. And this other winch that you are talking about had cables that were attached to the barge that the sand was being loaded on; is that correct?

A. Yes, three of them.

Q. And there are three drums on that winch too?

A. Yes, three drums on that too.

Q. Did it have the same kind of cable?

A. No, they didn't have that big a cable.

Q. How big was that cable?

[fol. 42] A. Oh, I would say ¾ inch or inch cable.

Q. And was that steel cable?

A. Yes.

Q. Was this winch power driven the same?

A. Yes.

Q. And you say you operated that winch?

A. Yes.

Q. That is the winch that was attached to the barge that the sand was dumped on?

A. Yes.

Q. How about this other winch, now, that was attached to the dead men, you say you didn't operate that?

A. No, I didn't operate that. The Operator took care of

that, and I don't think we moved over twice while I was there, in six days.

Q. By "moving", you mean the barge that the dredge was on didn't move?

A. Yes.

Q. And so one of your main duties then, was to operate the winch that was attached to the barge on which the sand was put?

A. Yes, that's right.

Q. Now, would you state what some of your other duties were in connection with your jobs?

A. Well, I'd move that and grease up and——

Q. Now, what would you grease?

A. I greased that bucket.

[fol. 43] Q. Now, you are talking about the bucket which was used to pick up the sand from the bottom of the lagoon there?

A. Yes.

Q. And that was this bucket that had jaws on it that would close over the sand and gravel and it would be pulled up?

A. Yes.

Q. Now, was that power driven?

A. Well, it's powered from the derrick.

Q. The derrick was power driven, was it?

A. Yes.

Q. And how would they go about opening and closing the jaws of that bucket?

A. Well, that's all run from the cable on the derrick.

Q. That's all run from the main power driven machine; is that right?

A. Yes, That's right.

Q. Now, from the time that you would go to work around 2:00 o'clock, until you went back—until you went home at 10:00 o'clock, was your job always on this barge?

A. Yes, unless they had some extra work that they wanted us to do over around the plant.

Q. Yes. Well now, just going back to that barge again for a minute, where this dredge was, did you have any other duties in connection with your job there that you haven't explained to us yet?

A. Well, I don't know of any, unless the duties that we [fol. 44] would go up around the plant and do clean up.

Q. I mean just on the barge itself, did you have any other duties to perform there?

A. Well, I had to put them—when they brought in a barge, I had to put them cables on that barge, and when they got it loaded, I had to take it off.

Q. How would you go about putting the cables on the barge?

A. Well, they would be on where the derrick was, and I'd jump over on the barge that they brought in, and I'd have a flag pole or whatever they call it, and I would just reach down and get one cable and pull it over and hook it on one post out to the barge, and I'd go back and get the other one and hook it on to another corner, and then I'd go back and get a third one and hook it on another corner.

Q. And that would keep it in place?

A. Yes, and then I'd go back to the winch and adjust it where I needed it.

Q. If there was any break-down in any of the machinery, that is either the winch or bucket or the dredge or anything of that sort of thing, were part of your duties helping repair that damage?

A. Well, I don't know about that job over there, because I wasn't—I don't know whether they have a mechanic do that, because we didn't have no break-downs while I was there.

Q. I see. Was this job that you had on the Ross Island a little different than your usual duties?

A. Yes.

[fol. 45] Q. As I understand it, on the jobs that you held, if there was a break-down, it was your job to help repair it.

A. Yes. All these jobs, we—the operator and I get in there and fix it.

Q. Now, let me ask you this: In connection with your regular duties, not necessarily at Ross Island, but the jobs that you usually had, would you be called upon to lift rather heavy loads at times?

A. Oh, yes.

Q. By rather heavy, how heavy would the loads that you would be called upon to lift be?

A. Well, a lot of times, you had to wrestle, say, a 55 gallon drum around with fuel for your rig.

Q. Do you have any idea what that weighs?

A. No, I couldn't tell you.

Q. Could you give—do you have any idea how much weight you would be called upon to lift from time to time, would it be in the nature of a hundred pounds; one hundred and fifty pounds; two hundred pounds?

A. Well, that all depends on what your (sic) doing, sometimes you get ahold of something you can't lift, and then you holler for help, and a lot of the time, you get ahold of something and you say you can lift it, and then you get it down and get your knees under it and raise it up yourself.

Q. I see. Well, I was just wondering if you could just give the jury an idea about how heavy some of these loads you were called upon to lift were.

[fol. 46] A. Well, some of them weigh a hundred and fifty pounds—hundred and sixty pounds, a lot of them, and some of them, you take when you are overhauling machinery, some of them would take two–three men to handle them.

Q. And would you all be lifting to the full extent of your ability to lift?

A. Yes, all you could lift.

Q. And did that happen rather frequently, or just occasionally?

A. Just occasionally.

Q. How often would you say that would happen, that you would be called upon to lift heavy loads?

A. Well, you usually get that in the winter time, when you overhaul your equipment.

Q. How about during the summer time?

A. Oh, a lot of times, when you break down, you'd have to pull out a drum or something like that, it would break, and that would take a lot of lifting.

Q. All right. Now, to get back to Ross Island again, on the date that this accident happened, March 23, 1955, did you go out at 2:00 o'clock to your dredge there and start performing your regular duties?

A. Yes.

Q. And were you told at any time during the day to do anything different?

A. Well, I think we worked over there a couple hours, until about 4:00 o'clock, somewhere around that, and the [fol. 47] operator told me that we had to go over on the island and around the plant to do wome (sic) work over there, and then we got in a little boat and went over there.

Q. Now, when you—are you talking about around the rock crusher?

A. Around the rock crusher.

Q. Well, were you told what you were supposed to do when you got over to the area of the rock crusher?

A. Yes.

Q. And was this some foreman for the company?

A. Yes, there was a foreman over there that told you what to do.

Q. And some foreman told you to go over there in the first place?

A. Well, he must have sent word over with the fellow that brought the barge over.

Q. I see.

A. I didn't get it, I wasn't—I was back by the big winch when he brought the barge over. I guess the fellow that runs the tow-boat gave the operator the order.

Q. Well, at any rate, you were told to go over around the rock crusher?

A. Yes.

Q. And then what were you told to do?

A. Well, they had a bunch of stuff to move and haul over there, and kind of clean around, away from some of the gravel bins there, and we done that, and then we—they told [fol. 48] me that they was going to load this gravel bin on this barge, so I went down to help them load this gravel bin onto this barge.

Q. Now, by a "gravel bin", is a gravel bin ever called a hopper?

A. Well, it's a hopper, most of them call it a gravel bin.

Q. Well, describe what a gravel bin is here.

A. Well, it's just—it just comes like that (indicating), and then square up where they put this gravel, and it's

built high enough so trucks can get under it and load out of it from under there—get their loads out of this hopper.

Q. And you were told that you were going to load one of these gravel bins from one barge to another; is that it?

A. Yes.

Q. And you were directed to go over there and help get the thing loaded and unloaded?

A. Yes.

Q. All right. Now, just tell the jury what the operation was for getting this gravel bin or hopper from one barge to the other; what did they do?

A. Well, when I got down there, they was hooked on to it, and was swinging it over to the other barge with this derrick. Well, when I got down there, they was just about ready to set it down on this barge.

Q. Now, this derrick you are talking about—was the derrick you are talking about on dry land?

A. Yes. It's what they call a "stiff-leg", it's setting on [fol. 49] concrete.

Q. Now, this was right in the area of the gravel crusher, was it?

A. Yes.

Q. All right, go ahead.

A. So, when I got down there, they had this gravel bin coming around, so we—two or three fellows came over from the tow-boats to help me set it down.

Q. Now, before we go any further here, so the jury will know just where we are talking about, I will ask you if the gravel crusher is in this area right in here some where (indicating)?

A. Yes, right in here (Indicating).

Mr. Schwab: Why don't you have it marked, Arno, since it's yours?

Q. In other words, the gravel crusher is in the same area between the two islands; is that right?

A. Yes, this is where your crusher is (indicating).

Mr. Schwab: He has pointed out an area right in here (indicating).

The Clerk: Defendant's Exhibit 10 for Identification.

(Document referred to was marked Defendant's Exhibit 10 for Identification.)

By Mr. Schwab:

Q. I will show you an exhibit which has been marked Defendant's Exhibit 10 for Identification, and I will ask you if that is more of a close-up of the gravel crushing area?
[fol. 50] A. Yes, sir, that's better.

Q. Well, that's about all that is shown on that is the gravel crusher?

A. Yes, that's all that is shown on this, practically.

The Court: Do you want to introduce it in evidence?

Mr. Schwab: Well, it is the defendant's exhibit, I don't want to preempt him.

OFFER IN EVIDENCE

Mr. Denecke: I will introduce it.

Mr. Schwab: No objection.

The Court: Receive Defendant's Exhibit 10.

By Mr. Schwab:

Q. Now, you say—I think you ended off when they were just about to set this hopper down on the second barge, the barge that you were putting it on?

A. Yes.

Q. And, where were you at this time; were you on the land or were you out on the barge?

A. I was on the barge then, already.

Q. You were on the barge that they were going to load the hopper on?

A. Yes.

Q. Now, how was the—you mentioned there was a derrick that was being used to load the hopper from one barge to the other?

A. Yes.

Q. How was that derrick attached to the hopper?

A. Well, I never got to the top, but I imagine it was a cable—you know, they have rings on top where we usually [fol. 51] stick a cable, and then it was fastened around the bucket, and hooked on, and this guy just picks up the bucket, and that way he raises the hopper.

Q. Now, this derrick that your (sic) talking about, that

they had lifting the hopper from one barge to the other, that is power driven, I assume too, isn't it?

A. Yes.

Q. Now, did you help to get the hopper set down on the barge?

A. Yes.

Q. In the manner they wanted it set down?

A. Yes, you had to turn it and set it down right.

Q. While it was still off the barge?

A. Yes, while it was still up in the air. It was down maybe two feet from the sand they was going to set it on—it was about two feet up in the air yet.

Q. Well, the hopper then, was eventually set down on the barge?

A. Yes.

Q. And then you had to get the cable that was being used that was attached to the derrick loosened up so that you could get it?

A. Yes, that was fastened to the derrick and the hopper.

Q. So was that your job to do that then?

A. Yes.

Q. What did you do?

A. Well, I started up, and I went up one ladder and [fol. 52] stepped around the corner and started up the other ladder, and I got my hand on about the last rung when the ladder pulled away.

Q. Well, by the last rung, what do you mean by that?

A. The top rung, right at the top.

Q. Now, before we go any further on that, I am going to show you Plaintiff's Exhibit 5 for Identification, I will ask you what that is?

A. That's the hopper.

Q. Is that the hopper we have been talking about?

A. That's the hopper we have been talking about.

Mr. Denecke: Excuse me, which one is that?

Mr. Schwab: 5.

By Mr. Schwab:

Q. Now, just so there will be a little more explanation here, what do they use that hopper for?

A. To load material out of. They dump material up in here (indicating), and their trucks pull in here and haul it out.

Q. This is high enough for trucks to drive underneath it?

A. Yes.

Q. All right. Now, I will show you Plaintiff's Exhibit 6, and ask you what that is?

A. That's the hopper.

Q. That's another view of the hopper?

A. Yes.

Q. And, I will show you Plaintiff's Exhibit 7, and I will ask you what that is?

[fol. 53] A. Well, that's the top of the hopper, see, that's where they dump everything in from the top.

Q. Now, I will show you Plaintiff's Exhibit 8, and I will ask you what that is?

A. Well, that's the legs of the hopper right there, and there is your lever that they use to open the gates to load the gravel from.

Mr. Denecke: Excuse me, what is that?

The Witness: The lever on the side where they open the gate.

By Mr. Schwab:

Q. Now, you notice something leaning against the side of the hopper there—right in here (indicating), and I will ask you what that is?

A. Well, that's just the braces in there. This is the old ladder setting up here (indicating), alongside there.

Q. That's the ladder?

A. Yes.

Q. Is that the ladder that you climbed up on that night?

A. Yes, that's the ladder that pulled loose.

Q. Incidently, (sic) were you present when this picture was taken?

A. Yes.

Q. And, at that time, was this ladder just leaning up against the hopper?

A. No, it was next to a shed, we set it there.

Q. But, at the time the picture was taken, the ladder was leaning up against the hopper; is that right?
[fol. 54] A. Yes.

Q. In other words, it wasn't attached to the hopper?

A. No.

Q. All right. Now, in connection with this Plaintiff's Exhibit 8, I will ask you if that is a true representation of the way the top of the ladder looked at the time of the accident?

A. Yes.

Q. With the exception, of course, that it is now completely off of the hopper?

A. That's right.

Q. I will show you Plaintiff's Exhibit 9 for Identification, and ask you what that is?

A. That's the ladder setting down—a lower shot—well, that's the bottom of the ladder.

Q. That's the bottom of the ladder?

A. Yes.

Q. And, I will ask you also here, if this is a true representation as to how that portion of the ladder looked on the night of the accident?

A. Yes.

Q. And, in connection with the three views of the hopper—that is, 5, 6 and 7, I will ask you if those are a true representation of the way the hopper appeared on the night of March 23, 1955?

A. Yes, that's right.

Q. Now, this ladder that we are talking about, Plaintiff's Exhibit 8, you say, is the top of the ladder?
[fol. 55] A. Yes, this is the top here (indicating).

Q. And 9, is the bottom of the ladder?

A. That's the bottom of the ladder.

Q. Now, on Plaintiff's Exhibit 7, there appears to be a ladder that starts with a small line at the bottom, and they get bigger as they go up—about half way up?

A. Yes.

Q. I will ask you if that is the ladder that you climbed up that night?

A. Yes, that's supposed to be the ladder, and it came up

here (indicating), and then you cut over there and went up the other side up here (indicating).

Q. In other words, you went up this half ladder and then you went around the corner?

A. Yes.

Q. And then the other ladder that came down, as shown by 8 and 9 were attached on the other side?

A. Yes.

Mr. Denecke: Was that 5, that you were referring to at the last?

Mr. Schwab: The one showing the half of the ladder—the bottom half?

Mr. Denecke: Yes.

Mr. Schwab: That's 6.

By Mr. Schwab:

Q. Now, looking at the picture showing the top of the ladder again, there is two boards there, one appears to be longer than the other——

[fol. 56] A. Yes.

Q. Now, taking the longer of the two boards, where was that in relation to the top of the hopper?

A. That was—see, this here (indicating) was on the corner, and then this one come over from the corner.

Q. Well, let me ask you the question again: This ladder that was on the second half of the top half of the hopper——

A. Yes.

Q. —did the top of the ladder come somewhere near the top of the hopper?

A. Well, this one here did, but this here (indicating) didn't, because it come up—it was nailed to kind of a upright like this, see—this part was nailed along here, but this part here was nailed to the top.

Q. Well, is it a correct statement then, that the top of the longer of the two boards on this ladder, as shown by Exhibit 8, was nailed to the top of the hopper?

A. Yes.

Q. Now, I will show you Plaintiff's Exhibit 5 here, which is a view of the entire hopper, and I will ask you if that

is the side of the hopper to which the top section of the ladder was nailed?

A. Yes. This side here, and the lower half was on the other side.

Q. Now, the Plaintiff's Exhibit 5 shows some nail holes—what appears to be nail holes at the very top of the hopper, [fol. 57] and I will ask you if that is the approximate area where the ladder was nailed?

A. Yes. Well, see—the short end was nailed in here (indicating), and then that long one here, was nailed up here (indicating).

Q. Well, when you say "up here", I wonder if you could point that out——

Mr. Denecke: Your Honor, I haven't seen these pictures before, and I haven't known exactly what they were, but I think they should be offered, there is no objection, and I could study them I think he has gone beyond identifying them.

The Court: That's 5, 6, 7, 8, 9——

Mr. Schwab: 10 has been admitted.

The Court: Yes. 5, 6, 7, 8 and 9. How much longer is your direct examination going to take?

Mr. Schwab: Oh, I imagine it will take 30–40 minutes yet.

The Court: At this time, Ladies and Gentlemen of the jury, we will take the usual morning recess.

(Whereupon a short recess was taken.)

[fol. 58] The Court: All right, Mr. Schwab, proceed.

Mr. Denecke: I have no objection to 5, 6, 7, 8 and 9.

The Court: 5, 6, 7, 8 and 9?

Mr. Denecke: Yes, your Honor.

The Court: Very well, they will be received.

(Photographs were received in evidence as Plaintiff's Exhibits 5, 6, 7, 8, and 9.)

By Mr. Schwab:

Q. Now Mr. Hahn, so that there is no—we have got five pictures here—so there is no question as to what these

pictures show, I will ask you concerning 5 again. As I understand it, that shows the hopper?

A. Yes.

Q. And it also shows the side of the hopper to which the second or top section of the ladder was nailed?

A. That's right.

Q. And, as I understand it, the left side of the ladder was nailed to this large beam running clear across the top of the hopper?

A. Yes.

Q. And the right side of the ladder was nailed to the board that appears above that beam that runs clear across the top?

A. Yes.

Q. Now, referring to exhibit 7, as I understand it, that shows—is a view of the top of the hopper?

A. Yes.

Q. Now, which are—strike that. Does the side of the [fol. 59] hopper to which the top section of the ladder was nailed, show on this picture?

A. Well, this is where the ladder come up on this (indicating).

Q. You mean now, your pointing to the left side of the picture, and showing the side of the hopper which just appears on the left side of the picture; is that correct?

A. That's correct.

Q. And you are not pointing to the side of the hopper which shows as a frontal view?

A. No. This is the long side of the hopper.

Q. And the ladder, as I understand it, was nailed to the side which shows in this picture?

A. Yes.

Q. And, to make that a little clearer, is there a board there that appears to be hanging down there a little bit?

A. Yes, that's the board that pulled loose, that the top part of the ladder was nailed to.

Q. All right. Now, referring to Exhibit 6, as I understand it, this shows a side of the hopper in question, and it also shows the bottom section of the ladder?

A. Yes.

Q. Now, in connection with that, as I understand it, you

went up the bottom section of the ladder, which shows on that——

A. Yes.

Q. —picture, then when you got up to the middle of the hopper, you went around the——

[fol. 60] A. Yes, over to the right.

Q. Over to the right, and then up to where the section of the ladder was nailed?

A. Yes.

Q. And, referring to Exhibit 8, as I understand it, that shows the top portion of the ladder on which you were at the time that it broke loose?

A. Yes.

Q. And that picture shows the top rung of the ladder, together with the two boards that formed the supports for the ladder?

A. Yes, that's right.

Q. And, referring to Exhibit 9, as I understand it now, that shows the bottom of the ladder?

A. Bottom of the ladder.

Q. And the ladder we are talking about, is the ladder that was nailed to the top half of the hopper?

A. Yes.

Q. Now, while they are looking at those pictures, Mr. Hahn, I am going to show you again Exhibit 4, which was an aerial photograph of Ross Island. and I am going to ask you to mark on here with an "X", the approximate spot in the lagoon there where your regular duties were carried on, that is, when the dredging operations were going on.

A. Okeh.

Q. Just put a small "X" in the general area where the dredging operations were carried on.

[fol. 61] A. There, that's better.

Q. You have inked an "X" in the lagoon area, in the general area where the dredging operations were carried on?

A. Yes.

Q. Now, I will ask you to—with the same pen, ink a little circle in the general area where the barge was located, where the hopper was put, where you fell that night.

A. Okeh.

Q. All right. Now, you went up the bottom section of the ladder, you went around the corner and started up the second section of the ladder?

A. Yes.

Q. And you had gone up to about the top rung, as I understand it?

A. Yes, I had my hand on the top rung.

Q. And, what happened then?

A. Well, the ladder just pulled loose from the gravel bin and just come backwards, and I——

Q. And what happened to you?

A. Well, I started to fall, and so I finally hit the deck.

Q. Did you hit anything on the way down, or did you fall straight down?

A. I fell straight down.

Q. And how did you land, Mr. Hahn?

A. Well, I hit with the point of the sand coming like that (indicating) across my back, and my head on one side and my feet on the other side of this point of the sand.

[fol. 62] Q. Did you light on your back or on your side?

A. Right smack on my back.

Q. You mentioned some sand, was there some sand on the barge at the time you fell?

A. The barge was loaded with sand, and it was wet sand and hard packed, and when I hit, it kind of knocked the wind out of me, and I kind of looked and I seen the ladder coming down, and I stuck my arm up like that (indicating), and the ladder struck me across the arm.

Q. All right. Did the whole of that ladder, that second section of the ladder come down, or just a part?

A. Yes, the whole section.

Q. Now, you have testified that this happened around 8:00 o'clock at night?

A. Yes.

Q. And of course it was dark at that time?

A. Yes, it was dark.

Q. Was there any artificial lighting in that area?

A. Oh, yes, they had flood lights around, you know.

Q. Was there light from the flood lights on the barge and on the hopper itself?

A. Yes.

Q. Did you have any trouble seeing the hopper?

A. No.

Q. Now, would you state—well, strike that. Do you know how the ladder, this second section of ladder that you were on when you fell, how that was fastened to the hopper?

[fol. 63] A. Well, it was just nailed.

Q. It was nailed?

A. Yes.

Q. And, do you know how many nails it had in it?

A. I couldn't say for sure, I think there was three nails on each arm of the ladder.

Q. I mean how it was nailed to the hopper.

A. Well, it was nailed on the top on both sides and on the bottom.

Q. You say with three nails on each side?

A. Yes. I wouldn't say for sure, but I think that's what it was.

Q. Now, was there anything else whatsoever there to hold that ladder in place?

A. No.

Q. Was there any bolts?

A. No.

Q. Either through bolts, "U" bolts, or chains or anything else?

A. No, that was all that was in it, just them nails.

Q. And did you observe the condition of the hopper at the top where this second section of ladder was nailed, insofar as the condition of the wood that was used for that portion of the hopper where the ladder was nailed at the top?

A. What do you mean by that?

Q. Well, did you notice the condition of the wood?

A. Oh, yes. It was rotten.

[fol. 64] Q. It was rotten?

A. Yes.

Q. Are you speaking of the wood right in the area where the ladder was nailed?

A. Yes. Well, the whole top of it was rotten.

Q. Now, let me ask you this: Had this ladder been fastened up there—the second section of ladder been fastened with bolts or with rivets, or with a chain around the ladder

and around the hopper itself, would that in any way have impaired the efficiency of the hopper?

A. No, there is a lot of them made that way, most of them are made that way.

Q. Or if the ladder had been securely fastened to the hopper in some manner, would that have interfered with the efficiency of the use of the hopper?

A. No.

Q. Or would it have interfered with the efficiency of the hopper if the top boards or planks where the ladder was nailed had been sound wood instead of rotten wood, as you have described it?

A. No, it should make the hopper better.

Q. Had anyone, prior to your going up this ladder, warned you as to the condition of the ladder?

A. No.

Q. Or the condition of the hopper?

A. No.

Q. Now, were there other employees of the company [fol. 65] around at the time you fell, Mr. Hahn?

A. Yes.

Q. And were they all employees of Ross Island?

A. Yes.

Q. Now, you state you fell off the ladder and hit on your back in this wet sand?

A. Yes.

Q. You say the wind was knocked out of you temporarily; the ladder came down; you put your arm up to ward it away, and the ladder hit you on the arm?

A. Yes.

Q. All right. Now, state what happened after that.

A. Well, one of the fellows came up to me and asked me if I was hurt, and I said, "No, I don't think so, I think the wind is knocked out of me." And he said, "Lay there for a while, maybe you will be all right." So I laid there two, three or four minutes, and I started to get up and he helped me up, and I started to go ahead and work, and the longer I worked the worse I felt.

Q. Now, how late did you stay out there on the island that night, Mr. Hahn?

A. Until 12:00 o'clock.

Q. How did you happen to stay out that late, when your shift usually ended at 10:00?

A. Yes. Well, they had some work to do with the plant, and we were supposed to help.

Q. You are talking about the crusher plant?

[fol. 66] A. Yes, they were changing some chains, and we were supposed to help them and get the chains changed, so we stayed until 12:00 o'clock.

Q. I see. Now, after that then were you taken to the plant—to the main plant on the dock there?

A. Yes.

Q. And did you go home from there?

A. I went home from there.

Q. Now, around 12:00 o'clock, how did you feel?

A. Well, I felt pretty bad, I couldn't hardly make it up to the shore.

Q. You say you felt bad, in what area?

A. In my back, it was paining me.

Q. Would you just indicate so the jury will have an idea of your back, where you hit it and where it hurts you?

A. Right in the middle of my back.

Q. The lower portion there, or right in the middle?

A. Right in the middle.

Q. All right. Now, you went home then, did you?

A. Yes.

Q. Did you go to work the next day?

A. No, I ain't went to work since.

Q. What was your condition the next day, Mr. Hahn?

A. I was pretty sore.

Q. You were sore?

A. Yes.

Q. Your back. Anything else?

[fol. 67] A. My back and my neck.

* * * * * * *

[fol. 68] Harry A. Hahn was thereupon recalled as a witness in his own behalf, and having previously been sworn, was examined and testified further as follows:

Further direct examination.

By Mr. Schwabe:

Q. I would like to ask you a couple more questions, Mr. Hahn. You answered this morning, in answer to a question

that I asked you, how many members there were in your union over there, and you said 16000?

A. Yes, I made an error.

Q. Did you check up on that?

A. I checked up on that at noon.

Q. And what did you learn?

A. There is between 3700 and 4000.

Q. Do you know where you got the idea of 16000?

A. I don't know where I got that idea.

Q. Just one other question, Mr. Hahn. Now, you testified as to your regular duties out there on Ross Island where you were working on this dredge, and you were filling up these barges?

A. Yes.

Q. Now, when the barges were filled up with sand, where were they taken?

A. Over to the plant—over to the crusher.

Q. In the area where you marked a circle this morning on that Exhibit 4?

A. Yes.

[fol. 69] Q. In connection with that hopper that you were testifying to, that you were climbing at the time you fell, had you ever seen that hopper before?

A. No.

Q. Just one other question, Mr. Hahn, I didn't ask you how your neck felt at the present time?

A. Well, it feels pretty good right now.

Q. Does it give you much trouble at the present time?

A. No, not right now.

Q. I don't mean this minute, but does it bother you from time to time?

A. Now and then it bothers me.

Q. In what way?

A. Oh, I don't know, it just snaps and pops in there.

Q. Does it cause you any pain at all?

A. Yes.

Q. How often and how bad?

A. Oh, about—oh, I'd say once a month o something like that.

Q. Is it a severe pain or just a light pain?

A. Well, it's not too severe.

Mr. Schwab: All right, that's all. You may cross examine.

Cross examination.

By Mr. Denecke:

Q. Mr. Hahn, I hand you what has been marked Defendant's Exhibit 10, which is, as you see, a picture of part of what is shown on 4 here?

[fol. 70] A. Yes.

Q. I wonder if you would first point out—use your finger there—point out on that where you were at the time you fell from the hopper?

A. Well, there is your rig, and I'd be right on the bottom, as far as that boom comes down, and that would be right in there (indicating), where that string is coming down.

Q. May I see it just a minute here, and we will have this marked. There is a barge there in this picture?

A. Yes.

Q. Is that about—where?

A. That's about where it would be, so this boom here (indicating)—the tip of that boom could reach the end of that barge.

Q. Would you mark on here with the pen, Mr. Hahn, where it was that you were, as best you can remember?

A. Well, put an "O" there, or——

Q. An "O" or an "X", either one, where you are going to put——

A. An "O", right about in there (indicating). See, that cable comes right straight down to the tip of your boom.

Q. And that, Mr. Hahn, that "O" is right on a barge that is in the picture there?

A. Yes.

Q. And, do I understand that the barge that you were on when you fell from the hopper was about where that barge [fol. 71] in the picture is?

A. About where it is, as close as you can get to it.

Q. Now, do you know, Mr. Hahn, when this hopper came into the lagoon there? By lagoon, I mean the water between the two islands?

A. No, I don't know.

Q. When that came in—you don't know where it came from?

A. I don't know where it come from.

Q. Do you know whether that barge with the hopper on it was there when you went out to the dredge on the afternoon when you started work on Wednesday, March 23rd?

A. I don't know whether it was there then or not. I don't think it was. I couldn't say for sure.

Q. Now, as I understand it, Mr. Hahn, you went back and forth to the dredge on a small boat—in a small boat?

A. Yes.

Q. And, where did you go to the dredge from; the mainland there?

A. From the mainland.

Q. And the mainland that I am talking about, and I think you were, where the Ross Island has their place there, right off McLaughlin Boulevard and down hill to the bank?

A. Yes.

Q. Let me get one other thing straight, Mr. Hahn. In Plaintiff's Exhibit 8, which is the ladder here——

A. Yes.

Q. —as I understand it, this was taken sometime after [fol. 72] your accident?

A. Yes.

Q. And this ladder that is in the picture here, was leaning against a shed of some type, not around the hopper?

A. Well, about ten feet from the hopper.

Q. It wasn't leaning against the hopper?

A. No, sir, it wasn't.

Q. Then, for the purpose of this picture, you or somebody took the ladder and put it over against the hopper?

A. That's right.

Q. What kind of work, Mr. Hahn, were you thinking about doing down in Salem; you said it was a temporary job for a couple months?

A. Checking trucks.

Q. Checking trucks?

A. Yes, just put down the time you came in and went out.

Q. But you would have to drive from your home here in Portland down to Salem every day?

A. Yes, I'd stay in the car all day to do that.

Q. Mr. Hahn, before you went to Ross Island, had you worked for Rogers Construction?

A. Rogers Construction, yes.

Q. And, when did you leave Rogers; about when?

A. Gosh, I couldn't tell you, I have no idea.

Q. Let's see. You started at Ross Island in March of '55. Had you worked with Rogers in '55 at all?

A. Yes—no, I didn't work in '55—yes, I did too. I worked [fol. 73] in '55 for Rogers.

Q. In the winter there, of '55—let me put it this way, winter of '54 and '55?

A. Yes.

Q. You don't recall when you left them?

A. No, I don't.

Q. And, then, did you work for Mr. Perkins, one of the prospective members of the jury?

A. Yes.

Q. Did you work for him before Rogers?

A. No, I worked right after I left Rogers, I worked for him.

Q. And then——

A. And then Ross Island.

Q. Mr. Hahn, when you were working there on the dredge, you worked there—let's see—five days?

A. Six days.

Q. Six days. There were—am I correct, that during that time you saw tugs or tow-boats bringing barges into—I will have to point the area out—can you see this? Into the area—maybe I better use a picture here instead—into this—I have called it a lagoon, and I mean this whole body of water between what we have marked as Ross Island and Hardtack Island on Exhibit 4?

A. Yes.

Q. Did you see tow-boats bring barges in and take barges out from this general area?

[fol. 74] A. Not from this area out this way (indicating), but from here over here you see (indicating).

Q. Oh, I see. From where you were working, you couldn't see what happened in here (indicating)?

A. No.

Q. As I understand it, what you saw them do, was a tow

boat, or a tug-boat would take a barge that was filled by the dredge you were working on, and tow or pull it over to what you describe as being the crushing plant, where you were hurt?

A. Yes.

Q. And they would also bring emties (sic) from there over to where you were working on the dredge?

A. That's right.

Q. On that picture, and I guess I better—Exhibit 4, and I don't know whether you can see it from there, Mr. Hahn, there is some log rafts parked there?

A. Right in here, yes. (indicating)

Q. You have observed log rafts parked or moored in that lagoon in there?

A. Yes.

Q. Did you ever see these brought in or taken out?

A. No, I didn't.

Q. This dredge that you were working on was—I refer to it as a barge, it is a barge, isn't it, with a crane on it?

A. Yes.

Mr. Denecke: That's all, your Honor.

The Court: Any redirect examination?

[fol. 75] Mr. Schwab: No, your Honor.

The Court: That's all. Ladies and Gentlemen of the jury. You have three very able lawyers here, and we have had a little difficulty, so we may have to recess until tomorrow. You want to make your stipulation out of the presence of the jury, and read it to the jury tomorrow?

Mr. Schwab: I think that's right.

The Court: They wish to shorten things in this case, by stipulating to a lot of facts, and they are going to get it in the record and read it to you tomorrow.

At this time, we will take a recess until 9:30 A.M. tomorrow morning, and please remember the admonition of the Court, and don't discuss this case amongst yourselves or any other person.

(Whereupon the jury was excused and the following proceedings were had out of the presence of the jury:)

Mr. Buttler: Harbor lines have been established by the United States War Department pursuant to 33 U. S. C. A.

Section 404 in accordance with the chart marked Plaintiff's Exhibit C, which chart accurately indicates the location of the harbor lines around Defendant's property involved herein by a broken line over which has been drawn a red pencil line. Said chart may be admitted in evidence without further identification for the purpose only of showing the location of the harbor lines at the time of the accident herein.

The chart marked Plaintiff's Exhibit D is what it pur- [fol. 76] ports to be, and accurately represents the conditions shown as they existed in 1895. Said chart may be admitted into evidence without further identification.

Defendant has secured the payment of compensation under the Longshoreman's and Harborworker's Compensation Act, (33 U. S. C. A. Section 890), in the manner provided for by the said Act, but this part of the stipulation shall not be a (sic) available to the Defendant on motion for non-suit, if such a motion is made. Defendant has rejected the Oregon Workmen's Compensation Act and has provided private insurance which would cover defendant's liability under the Oregon Employer's Liability Act or its liability under the rejected Oregon Workmen's Compensation Act.

Mr. Denecke: The Defendant does not admit that the rejection of the Oregon Workmen's Compensation Act or the procuring of other insurance is relevant or material and contends to the contrary and only makes this stipulation to save plaintiff calling a witness to the effect and making an offer of proof to this effect, in as much as the Court has already stricken plaintiff's Further and Affirmative Reply.

Mr. Buttler: Plaintiff's life expectancy at the time of the accident was 16.43 years.

Plaintiff's medical expenses incurred in the amount of $342 are reasonable.

(Whereupon a recess was taken until 9:30 A.M. the following morning, February 10, 1956.)

[fol. 77] (Friday, February 10, 1956, 9:30 o'clock A.M., pursuant to recess, proceedings were resumed in open court in the presence of the jury as follows:)

The Court: Call your next witness.

Mr. Schwab: Plaintiff calls Mr. Kudzia.

EDWARD KUDZIA was thereupon produced as a witness in behalf of plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Butler:

Q. Would you state your name, please?
A. Edward Kudzia.
Q. You are employed by the defendant Ross Island Sand & Gravel Company?
A. That is right, sir.
Q. How long have you been employed by them?
A. This is not positive; I think since the 6th of August, 1952.
Q. Then you were employed by them on March 23rd, 1954, at the time this accident occurred?
A. Yes, sir.

Mr. Denecke: '55.
Mr. Butler: 1955, correct; excuse me.

Q. Now, were you in any way involved in the loading operation of the hopper from one barge to another; that is, the hopper that was involved in this accident?
[fol. 78] A. Yes, I was.
Q. Now, how were you involved?
A. I unhooked the hopper; hooked—unhooked the crane from the hopper, rather.
Q. Well, now, let me go back then. How did you happen to be around at the time the hopper was being loaded?
A. We work on the boat and we tow the material and also the hopper from one job to the other.
Q. Now, what type of work do you do for the defendant?
A. Well, I am a boatman.
Q. You are a boatman?
A. Yes.
Q. On what kind of a boat?
A. A tugboat.
Q. On a tugboat. And the tugboat on which you were a boatman was at the scene of the accident; is that correct?
A. That is right, sir.

Q. What was the towboat's function in the operation, if any?

A. Tow material from one job to the other.

Q. Well, I mean in this particular loading operation.

A. None whatsoever; we were standing by.

Q. You were just standing by?

A. That is right.

Q. How did you happen to get onto the barge on which the hopper was being loaded?

A. The towboat was tied alongside the barge.

Q. That is the barge to which the hopper was being moved?

[fol. 79] A. Being loaded, that is right, sir.

Q. Yes. Now, how was the hopper being moved aboard the barge?

A. By a stationary whirley from the beach.

Q. When you say a whirley, would you describe what that is?

A. Well, that is a crane for either picking up heavy objects or unloading gravel.

Q. And the hopper was hooked to the crane and lifted and moved over to the barge to which it was——

A. That is right, sir.

Q. —to be loaded?

A. That is right.

Q. Now, did you see the plaintiff, Harry Hahn, on the barge?

A. Yes, I did.

Q. Did you see him attempt to climb up on the hopper?

A. Yes.

Q. Did you see him fall?

A. Yes.

Q. Can you state what happened when he fell?

A. From the way I recall he climbed up the ladder and I—at the time that he fell I wasn't looking up, but he did fall almost on top of me; something brushed my shoulder and Mr. Hahn was laying alongside the hopper with the ladder.

Q. With the ladder?

A. Yes.

Q. And was the ladder pulled loose from the hopper?

A. That is right.

[fol. 80] Q. At that time did you observe how the ladder had been attached to the hopper?

A. The ladder was attached with 60 penny spikes.

Q. Were there any bolts of any kind used?

A. That I couldn't say; I can't recall.

Q. You didn't see it?

A. I didn't see it.

Q. All you saw were nails through the ladder?

A. That is right.

Q. After Mr. Hahn fell what if anything did you do?

A. Well, I kneeled down alongside him and asked if he was hurt and told him to lay still if he was hurt so that he wouldn't injure himself further, and he laid there for some time and then he told me he was feeling better.

Q. Then what did you do if anything? Did you do anything further on the barge?

A. Well, then I can't quite—that has been quite some time, I can't quite recall. I think Mr. Hahn got up and then I took his place as he left.

Q. When you say you took his place, what do you mean?

A. So the work wouldn't stop; I went up to cut loose from the hopper.

Q. You unhooked the crane from the hopper?

A. Yes, sir.

Q. Now, in getting up on the hopper did you observe the condition of it?

[fol. 81] A. Well, I crawled—I crawled up the side of it.

Q. Yes. And did you observe in what condition the hopper was at that time?

A. Well, it was an old hopper, one which had been used regularly on these jobs, and I am not authority on—on hoppers, I am a boatman; it seemed kind of more or less as an old hopper is all I can say.

Q. I am handing you Plaintiff's Exhibit 5 and will you state whether that is a picture of the hopper which was involved?

A. Yes.

Q. And that picture accurately represents the condition in which the hopper was at the time of the accident?

A. Well, yes, I guess it would.

The Court: Keep your voice up, please.

A. I guess it would.

Q. As far as you know it is?

A. Yes.

Q. Now, the view shown in Plaintiff's Exhibit 5 would show the fact of the hopper to which the upper section of the ladder was attached; is that right?

A. I can only state as I think I remember; this may not —the ladder here would come up the side, you would get on a platform and then work your way—the ladder was approximately up the face of the——

Q. Up the center of that face of the hopper; is that correct?

A. As close as I remember, yes.

[fol. 82] Mr. Denecke: That is No. 5?

Mr. Butler: No. 5. Your witness.

Cross examination.

By Mr. Denecke:

Q. Mr. Kudzia, your job, as I understand it, is on one of the tugboats for Ross Island; that is the ROSS ISLE, is it not?

A. That is right, sir.

Q. And how large is that tugboat?

A. Oh, a little over 50 feet.

Q. And what generally does the tug ROSS ISLE do?

A. We tow sand and gravel from one job to the other.

Q. Mr. Kudzia, I hand you Defendant's Exhibit 10, which we have all stated was an aerial photograph of what has been referred to as the crushing plant and a portion of what we have sometimes called the lagoon or the water between Ross Island and Hardtack Island. Now, where do you come—or let me ask you this: At the night that Mr. Hahn was injured was your tug tied up approximately where Mr. Hahn has previously inked in a circle; and I am only asking approximately?

A. That——

Q. Can you see that circle there? It is hard to get the ink to take on there. See it right there (indicating)? And I am only asking approximately.

A. That was along—it is the approximate place, but we was alongside the barge, not on the end of the barge.

A. There is a barge shown in this picture?

[fol. 83] A. Yes.

Q. And you were alongside of it?

A. We were alongside, not on the end of it. We were not hooked up; we were just laying alongside.

Q. And does the tug ROSS ISLE work in and out of this area of water between Ross Island and Hardtack Island? By "in and out", come in here and go out of here (indicating)?

A. Yes, it does.

Q. And how do you go out of this lagoon or body of water here?

A. There is two entrances; one along Hard' .ck Island and one along the plant.

Q. Now, do I understand, so I can be sure, Mr. Kudzia, there is a tower of some kind right in the——

A. Center.

Q. —in the center of the entrance into this body of water between Hardtack and Ross?

A. Yes, sir.

Q. And I do understand correctly that you go in and out of there with your tug on one side of that tower or the other, sticking close to Hardtack or sticking close to Ross?

A. That is right, sir.

Q. And I am not—we are not interested in exactly what your course of navigation is.

Now, where do you go——

Mr. Butler: Your Honor, I think this is a little beyond the scope of the direct examination. If Mr. Denecke wants to make him his own witness that is perfectly all right.

[fol. 84] Mr. Denecke: I admit that is correct, your Honor, but the only reason I am doing it is I got these men here and it is known that it is necessary for them to—or at least we believe it is necessary for them to get back to the job in a hurry.

The Court: Do you want to make him your own witness?

Mr. Denecke: I would be glad to make him my own witness, your Honor.

The Court: All right.

By Mr. Denecke:

Q. Mr. Kudzia, where do you go with the tug ROSS ISLE?

Mr. Butler: Your Honor, I would like to state for the record that up to the present point all the testimony that has been given would be for the purpose of Mr. Denecke's own witness.

The Court: That is correct, from now on, yes.

Mr. Butler: From now on, and for that testimony which has been given, all of which had nothing to do with the direct examination.

Mr. Denecke: Your Honor, I will agree to that also.

The Court: Very well.

By Mr. Denecke:

Q. Mr. Kudzia, do you go down as far as the mouth of the Columbia with the tug ROSS ISLE?

A. Yes, we do.

Q. And that is on the Columbia?

A. I would take that back. We come within, oh, approximately three miles of the mouth.

[fol. 85] Q. You don't go to the bar?

A. No.

Q. You come about three miles inside the Columbia River bar, is that correct?

A. That is right, sir.

Q. Am I right you are referring now to Ilwaco?

A. Yes, that is right.

Q. On the Washington side of the river there?

A. That is right.

Q. And how far up the Columbia do you go?

A. Since I have worked for Ross Island we have went as far as above Cascade Locks—rather, the Bridge of the Gods.

Q. Is that the one that is called Bonneville Locks now?

A. No; that is above the Bonneville Locks.

Q. That is above the Bonneville Locks?

A. Above. We have been as far as above the Bridge of the Gods.

Q. I see. Now, with this particular hopper, that was the one that Mr. Hahn was climbing, Mr. Kudzia, where did that come from? Let me ask you this:

I think the testimony is, Mr. Kudzia, that the hopper came into the water there between Hardtack and Ross on the 23rd, the day that Mr. Hahn was injured. Do you know where it came from?

A. Well, it came from another job.

Q. And do you know where that other job was?

A. Yes; Sun Dial beach.

[fol. 86] Q. And did you bring the hopper from Sun Dial beach; that is, did you tow a barge on which the hopper was?

A. Yes, we did.

Q. And Sun Dial beach, is that on the Sandy?

A. That is on the Sandy, or approximately across the river from Camas, a little downstream on the opposite side.

Q. And you towed a barge with this hopper on it from Sun Dial beach down the Columbia and up the Willamette and into the lagoon or the water between Hardtack and Ross; is that correct?

A. That is right.

Q. Then do you know where the hopper went after Mr. Hahn's injury?

A. Yes.

Q. Where did it go?

A. It went to Cathalamet, Washington.

Q. And did you tow the barge out that took it to Cathalamet?

A. Yes, we did.

Q. And was it towed out on the barge on which the hopper was when Mr. Hahn was injured? I don't know whether I stated my question very well here.

When the hopper was towed out was it on the same barge that Mr. Hahn was at the time he was injured?

A. Yes.

Mr. Denecke: I think that is all, your Honor.

The Court: Mr. Butler?

Mr. Butler: No further questions.

[fol. 87] The Court: That is all; you are excused.

(Witness excused.)

Mr. Schwab: If the Court please, for the record the plaintiff and the defendant have stipulated that the life expectancy of Mr. Hahn at the time of the injury, March 23rd, 1955, was 16.43 years, and that the testimony concerning his bills in the amount of $342, that is medical bills and medical expenses, are reasonable amounts.

It is also stipulated that the defendant Ross Island Sand & Gravel Company was the owner of the hopper in question on March 23rd, 1955, and that the company was in charge of the loading operations going on at the time of the injury.

Mr. Denecke: So stipulated, your Honor.

The Court: Let the record so show.

Mr. Schwab: And the plaintiff rests.

Plaintiff Rests

Mr. Denecke: Your Honor, I would like to have permission for Mr. Kudzia and Mr. Rich, whom the plaintiff called, to be excused.

Mr. Schwab: That is all right.

The Court: Very well; you two gentlemen can leave if you have to go back to work.

Mr. Denecke: Did the plaintiff rest?

The Court: Plaintiff rests, yes.

Mr. Denecke: The defendant will call Mr. Muirhead, your Honor.

[fol. 88] Defendant's Testimony

Walter H. Muirhead was thereupon produced as a witness in behalf of defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Denecke:

Q. Your name is Walter Muirhead?

A. That is correct.

Q. And you are a resident of Portland, Oregon?

A. I am.

Q. Would you state what position you hold with Ross Island Sand & Gravel?

A. I am president of Ross Island Sand & Gravel.

Q. Mr. Muirhead, yesterday during this trial and last evening you were absent from the trial supervising the pouring of concrete on the Ross Island Bridge, were you not?

A. The Morrison Street bridge.

Q. Or the Morrison; excuse me.

A. That is right.

Q. Mr. Muirhead, how long have you been associated with Ross Island Sand & Gravel Company?

A. Since 1926.

Q. How many tugs or towboats does Ross Island Sand & Gravel Company now own?

A. Three.

Q. And, Mr. Muirhead, where do those tugs operate?

A. On the Willamette and Columbia Rivers.

Q. And do those tugs operate to and from the body of [fol. 89] water lying between Hardtack and Ross Island?

A. Yes; all of their work originates there.

Q. Originates or ends there; is that correct?

A. Yes. They start from there and take loads away and bring empties back.

Q. Now, Mr. Kudzia described the ROSS ISLE. Generally what size are the other two tugs?

A. Well, the ROSS ISLE is a 65-foot tug; Mr. Kudzia is a few feet short. He has been on the tug just a few years, but it is a 65-foot boat. One of the other boats is a 38-foot boat, and the other a 36-foot boat.

Q. And do you know what the——

A. All capable of towing barges.

Q. Do you know what the draft is of any of these tugs?

A. The big boat draws about nine feet.

Q. Do you know about the other two?

A. The other two are shallow-draft boats, what they will use for pulling log rafts around the river and coming

up close to the beach. We have quite a bit of that work to do around our properties there.

Q. And does——

A. They draw from—oh, around three and a half feet.

Q. Does Ross Island Sand & Gravel Company also own some barges?

A. Yes, we have ten barges.

Q. And those barges are used for what?

A. Moving of our products to customers.

Q. Now, in the area of water lying between Hardtack [fol. 90] and Ross Island are there log rafts moored?

A. Yes.

(Photograph was marked Defendant's Exhibit 25 for Identification.)

Q. Mr. Muirhead, I hand you Defendant's Exhibit 25 for identification and ask if you will state generally what that is, just generally?

A. Well, that is the picture of the Ross Island harbor.

Q. And do you know approximately when this was taken?

A. Well, I have these taken about every 90 days and I couldn't tell when this one was taken. We take them to show the condition and the number of rafts in and the condition of our stockpiles, we have an aerial photographer come over regularly, and also to show the height of the water, so I couldn't identify the exact time this was taken. I could by getting Brubaker, our photographer, and he could identify it from that number if it was desirable.

Q. Is that, however,——

A. I can tell you that it was taken within the last three or four years by the degree of excavation here. We dig—been excavating that island, and judging from the distance we are back, why, it is within the last three or four years. The land used to be way out here.

Q. And is it an accurate representation of what it appears to be there?

A. Exactly.

Q. Now, as far as these log rafts——

[fol. 91] OFFER IN EVIDENCE

Mr. Denecke: Your Honor, I will offer in evidence Defendant's Exhibit 25 for identification.

The Court: Any objection?

Mr. Schwab: I am just wondering about the purpose of the offer.

Mr. Denecke: Well, primarily it is a closer-up view of the same thing as shown in a high aerial photo in your 4. Your Honor can take a look here.

Mr. Schwab: We have no objection.

The Court: It will be received.

(Photograph received in evidence as Defendant's Exhibit 25.)

By Mr. Denecke:

Q. Now, as far as these log rafts in this body of water—and when I refer to body of water I am referring, Mr. Muirhead, to the water lying between Ross and Hardtack Island—the log rafts in there are brought in by whom? I don't mean the names of the persons but the class of persons.

A. Oh, various towboat companies.

Q. Various towboat——

A. Most of the towboat companies operating on the upper river operate into there, the Ramona Towboat Company, Stryker, the Mirene Company and, oh, I can't tell you the names of the others. We deal with the owners—with the owners of the logs in many cases, and sawmill companies, for the moorages. Knappton Towboat is one of the larger ones; they operate from the mouth of the river up to Portland; and then these other fellows operate [fol. 92] from Portland up to Oregon City locks where they pick up these rafts, most of them come from Albany and Salem vicinity.

Q. Now, Ross Island, Mr. Muirhead, charges a fee or a—they charge something to the owners of the rafts for mooring them there; is that correct?

A. So much a raft, yes, sir, per month.

Q. And as far as the rafts close into shore, are they anchored onto something on the shoreline there?

A. There are piling along here at different places that they tie to. Also we have some anchors out in the water that they tie to that are heavy concrete blocks down on the bottom, and in some cases they use a convenient tree, a large cottonwood.

Q. Ever since 1926, Mr. Muirhead, which is my recollection when you stated you became associated with Ross Island, has the water between the two islands been used by tugboats or boats of that general description?

A. Well, the first thing we did—it will show in one of the pictures here—we went up to the head end of the area and built a dike across, and of course to do that we had to tow a large dredge up there.

Q. And was that towed up through this——

A. Yes.

Q. —this body of water between the two islands?

A. That is correct. That was the first construction work that Ross Island did when they started to build their plant.

Q. Mr. Muirhead, do you know whether or not the Coast [fol. 93] and Geodetic Survey boat comes into this body of water between the two islands and makes soundings?

A. Yes; they come in regularly; and the Harbor Patrol patrols it regularly.

Q. In the summertime, particularly in the summer or spring and fall, Mr. Muirhead, when the weather is fairly good, particularly on week-ends, what do you frequently observe on the waters there between Hardtack and Ross Islands?

A. I don't believe I understand that question.

Q. Well, are the waters used between the two islands there, and I am speaking particularly in the summertime, by people other than towboats coming in with log rafts and tugboats bringing in barges and taking out barges? Are the waters used by any other class of persons?

A. Oh, yes, people cruising about in their private boats, cruisers in the range of 30-35 feet come up occasionally, and many, many fishermen and smaller craft come up on week-ends, anchor up there and fish over Saturdays and Sundays in certain areas where they have found fish plentiful.

Mr. Denecke: That is all, your Honor.

Cross examination.

By Mr. Schwab:

Q. Mr. Muirhead, you were testifying as to logs that you moor up there in that lagoon. What charge do you make for that?

A. Oh, it is not a fixed charge. We have leases with the Shaver Transportation Company—by the way, that is one [fol. 94] I forgot to mention there, they are one of the largest in the river; they have many thousands of feet leased around our area, including some of the east shore of Ross Island, and we charge them one fee.

Q. What do you charge them?

A. They pay $500 a month flat and then a proportionate amount, I can't recall the figure because we have so many, but for illustration it would be $500 a month permitting 12 rafts, let's say, and then it would be so much a month per raft in addition to that. We have that same deal with the Mirene Company and the same deal with Jones Lumber Company, which is a firm on the Macadam Road out here, one of the oldest lumber companies in Portland; we have had a deal with them for years.

Q. Jones was formerly owned by B. P. Johns, wasn't it?

A. No, no; it was formed as Jones. Johns might have had some interest in it in recent years, but it has always been Jones.

Q. Wasn't B. P. Johns president of the company?

A. He might have been in recent years, but recently he had nothing to do with it. He was an official of the Doernbecher Manufacturing Company making furniture out in Sulivan's Gulch.

Q. Are you acquainted with his son-in-law, Mr. Minton?

A. No, I am not. I knew his son.

Q. In talking about Shaver I think you said they paid $500 a month for——

A. They paid figures from two hundred up to five hun- [fol. 95] dred, it may even be five-fifty, different amounts. I can't recall all those financial matters.

Q. That was a fixed amount each month, was it?

A. Please?

Q. That was a fixed amount they paid each month, was it?

A. Oh, yes.

Q. For leasing that portion of the lagoon?

A. They don't have—they don't have areas in the lagoon; they have areas coming up to the mouth of the lagoon.

Q. Well, I am talking about the area between the two islands.

A. Well, I am not. You asked me what they got for log rafts. We moor all along the island. The people that moor inside moor outside, and they switch around.

Q. I am talking, Mr. Muirhead, about the area only between the two islands. We are not in this case interested in—there is no relevancy particularly in what was going on outside. Now, has your testimony been as to what you charge or what you allow to be rafted outside of the area of between the two islands?

A. That came about when I mentioned that the Shaver Transportation Company also towed in and out of there and that we had moorage rights with them; that was my last statement of one of the people with whom we do have moorage dealings.

Q. Now, does Shaver——

A. They do go in and out of there with rafts, because these rafts are interchanged between owners. In other words, for example, a raft will come down and it will be- [fol. 96] long to one firm when it comes down, and they will sort it on our property and pick from the raft peeler logs and the peeler logs will go perhaps to Weyerhaeuser in Longview, and then the sticks will go to a mill called Stebco over at Vancouver near the Aluminum Company.

Q. Now, is this——

A. And some of them will be sorted out and end up as piling.

Q. Does this go on in the area of the lagoon?

A. That is right.

Q. All right. Then they have——

A. Quite a bit of activity in there.

Q. That is all we are talking about here——

A. That is correct.

Q. —what goes on in the lagoon.

A. Correct.

Q. Now, my original question there concerning Shaver, you said something about them paying $500 a month. Is that for moorage that is done inside the lagoon?

A. No, that isn't correct; that isn't what the—as I told you he came up to the mouth of the lagoon. You asked me what Shaver Transportation paid us and I told you. You didn't ask me the location of the area in which he paid five hundred.

Q. Now——

A. So ask your questions correctly and I will answer them.

Q. Does Shaver moor logs inside the lagoon?

A. No, he does not.

Q. All right, then; that is all we are interested in.

[fol. 97] A. Well, then, ask your questions that way and I will answer them.

Q. I believe you testified on direct examination in answer to a question by Mr. Denecke that there were logs moored inside the lagoon?

A. Correct; but not by Shaver.

Q. The picture shows that there were logs moored inside the lagoon.

A. That is right.

Q. Now, who moors logs inside the lagoon?

A. The Mirene Company and the Knappton Towboat Company and the Jones Lumber Company.

Q. And what do you charge them for moorage?

A. I can't tell you exactly, but $400, $350, $22.50 a raft, $27.50 a raft, and depending how many rafts are in there, is what we get per month from them gross total.

Q. In other words, you charge them according to the number of rafts they have?

A. That is correct. Quite a substantial income from it.

Q. And they don't pay for moorage rights——

A. Yes, they do.

Q. —just on a flat basis?

A. Yes, they do.

Q. Oh, they do?

A. Yes.

Q. What is the flat basis they pay?

A. I told you three hundred, three hundred fifty, four [fol. 98] hundred a month, then so much a month in addition to an allowable amount of 10 or 12 rafts.

Q. Is it my understanding then that this flat fee is payable whether there is a raft in there or not?

A. That is correct.

Mr. Denecke: Excuse me, your Honor. I am going to object to any further questioning along this line. How much they pay here is not relevant to any question that that jury has or that the Court has in this matter.

Mr. Schwab: Well, this whole matter has been brought up here, your Honor, by the defendant, and since he has gone into it——

The Court: I appreciate that, but get down to the question whether or not the Ross Island Company was negligent here. What they are collecting for mooring rafts in there isn't going to make any difference.

Mr. Butler: The manner of payment, however, is relevant, your Honor, in terms of the question which will have to be decided by the Court. I think that was your purpose in bringing it out originally.

The Court: Don't you think you have pursued it far enough?

Mr. Schwab: I think probably so.

Q. Are these log rafts that are brought in by these towboats that you testified to—and I am talking about the lagoon only—are they left there sometimes for some months?

A. Well, they are usually brought in in the fall; they are [fol. 99] stored in there, of course—the heaviest period of storage is when we have the freshets on the Willamett (sic) River such as October, November, December; any time the Willamette is about to get up to a dangerously high velocity, why, they really crowd us. Sometimes we do not have room enough to work gravel because they want to get into a safe harbor where the current won't tear them from their moorings.

Q. Mr. Muirhead, are you familiar with the hopper that is involved in this case?

A. Yes, I am generally familiar with it. I didn't see it at the time of the accident or afterwards.

Q. Now, there has been some testimony in this case that that hopper had been up around the Camas area, I believe, or the Sandy River. What had it been used for up there?

A. I think we unloaded about ten or twelve barge loads up there that went to the Oregon State Highway Department for maintenance rock, maintaining the highway between Troutdale and Cascade Locks.

Q. In other words, it was used for the purpose of unloading gravel into trucks up there?

A. Crushed rock.

Q. Yes. And do you know for what purpose it was being sent to—I believe it was Cathalamet or Kalama?

A. Yes; it was being sent down there to deliver rock to Wahkiakum County, Washington for their roads.

Q. In other words, as soon as the hopper was gotten down there to wherever it was going to it was going to be [fol. 100] put into active service; is that correct?

A. Yes; it worked quite regularly.

Q. Are you familiar, Mr. Muirhead, with the provisions of the Oregon law concerning how ladders, fixed ladders, are supposed to be fixed to the building or structure which they are servicing?

A. I have——

Mr. Denecke: Your Honor—excuse me just a moment—your Honor, I object to this line of questioning unless the plaintiffs are now ready to use Mr. Muirhead as rebuttal. It certainly is beyond the scope of any examination of mine.

The Court: Objection sustained.

Mr. Schwab: Well, for the purpose of this question, your Honor, we will make Mr. Muirhead our witness.

The Court: Very well.

Mr. Schwab: Do you have the question, Mr. Muirhead?

The Witness: Yes. Didn't I answer that?

The Court: I interrupted you. You better read the question back to him.

(Last question read.)

A. I have read them so I presume I am aware of them.

Q. Are you familiar with the regulations of the Safety Code, Oregon Safety Code?

A. We are regularly inspected by the Oregon State Industrial Accident Commission.

Q. Well, now, Mr. Muirhead, are you familiar with the hopper in question here?

[fol. 101] A. Well, it is under my control. I have watched it work at numerous times; I have watched it work at Sun Dial beach and I have watched it work at various other points.

Q. Let me show you Plaintiff's Exhibit 5. Does that appear to be the hopper in question?

A. That is it.

Q. Let me ask you this now, Mr. Muirhead——

A. I think we have three like that and I presume the picture is of that one. I didn't know, I didn't take the picture. We simply have three.

Q. When was it the intention, if you know, Mr. Muirhead, of the company bolting the ladder in question which was used here to go up to the top of the hopper and the side of the hopper?

Mr. Denecke: I object to that.

A. I didn't hear that.

Mr. Denecke: Excuse me. Of what materiality, relevancy or what competency, your Honor, would be when was the intention of bolting it?

The Court: Read the question back to me.

(Last question read.)

A. In regard——

The Court: Just a minute, Mr. Muirhead. You are asking when they formed an intention to bolt it?

Mr. Schwab: Yes, when they intended to have it bolted.

The Witness: Can I answer that one, Judge?

The Court: He may answer.

A. That hopper and those hoppers, I am sure, were built [fol. 102] before the requirement of bolting ladders to hoppers.

Q. How old was this hopper?

A. I think the hopper was built in about 1940, as near as I am able to—'40 to '42, as near as I have been able to get from our personnel at the plant.

Q. I see.

A. And so its age would be about 13 years or so at the time of this accident.

Q. Well, this happened in '55.

A. Which is not unusual at all for a hopper. I think we are depreciating them on the basis of 20 or 25. You understand they are subjected to quite severe treatment; they get hit with the bucket, the cranemen are swinging the bucket from a barge over like this and dumping it——

Q. Yes.

A. —and in the handling the bucket hits the corners of the hopper and breaks off a timber or two and then when the hopper comes in we replace the timber and it is under a continual state of being altered from its original condition.

Q. Mr. Muirhead, you mentioned the cement blocks or cement——

The Court: He is not your witness any longer now?

Mr. Schwab: No.

The Court: Very well.

Mr. Schwab: I would like to be released from that, your Honor.

The Court: All right.

By Mr. Schwab:

Q. You mentioned the cement blocks or the cement struc- [fol. 103] tures that you had in the lagoon area there for the purpose of mooring these barges; is that correct?

A. Well, I mentioned that we have anchors.

Q. Yes.

A. Just exactly what form those take, how many are blocks, how many of them are large chunks of crusher

parts, anything that will hold a line adequately to moor a log raft, we tie our barge to some, but I can't tell you the form of the blocks.

Q. In connection with your operations on the lagoon there, your dredging operations, your mooring operations, any other operations you may carry on, do you have occasion to drive piling in the lagoon?

A. Oh, yes; we have driven many piling there.

Q. Does it appear in various places in the lagoon, the piling?

A. Please?

Q. The piling that you have driven in there, has it been driven in in various places in the lagoon?

A. Oh, yes. Our plant is literally on hundreds of piles, five, six, seven hundred piles we have around in there on various places.

Q. Various places?

A. The plant rests on pile; in places we will have fifty pile to hold just one corner up. Then we have scattered small ones over—some places to tie up a line to hold a dredge, other places to keep log rafts from drifting into the beach. We have sometimes 3-foot tides in some places; [fol. 104] we have pile driven in just to keep the logs from going in and getting high and dry on the beach and the boys couldn't pull the rafts off if they wanted to. We have them in for various purposes.

Q. Now you mentioned that your plant there—I assume you meant your crushing plant by that; is that where you are talking about?

A. Crushing and screening plant.

Q. Crushing and screening plant?

A. Uh-huh.

Q. You say that is on about 700 piles?

A. Yes, or more.

Q. And that was actually built then in an area, I assume, that was formerly part of the lagoon?

A. Part of it is, yes. We had to get—we had foundation problems for very heavy equipment, you know, severe vibration in crushers, and wherever that necessitated we put down more pile. Some places we will just pour concrete if the surrounding terrain is sufficient to hold up the load.

Q. Now, you have right near the crusher and screening plant there out in the water leading into the lagoon a rather large structure. What is that?

A. Well, that is the tramway terminal.

Q. That is the tramway terminal?

A. That is the device that takes our rock from there over to our plant on McLaughlin Boulevard. We call it the loading terminal. It probably has several hundred piles under it.

[fol. 105] Q. Now, that was built about how long ago?

A. That was built in '26.

Q. That was built in '26?

A. Built of wood.

Q. And what is the method of getting the rock or the sand and gravel into that tramway terminal there?

A. Belt conveyor.

Q. A belt conveyor takes it from the terminal over to the land plant, is that it?

A. Right is right.

Q. Is that the method that you use for getting all of the sand and gravel over to your land plant at McLaughlin Boulevard, or do you have other methods?

A. No, that is the sole method.

Q. In discussing this last aerial photo that was put in here, Exhibit No. 25, I think you said you could tell it was taken within the last three or four years by the amount of digging that had been done since that time?

A. Yes. Where those rafts at the right-hand side are moored, that is the excavated area.

Q. You are talking about right here (indicating on exhibit)?

A. That is correct. We are slicing that off by cutting towards your right arm—no, start up the other way towards you.

Q. This way (indicating)?

A. That is right. We are slicing that off and our dredge works progressively from one end to the other slowly cutting into the main island, clear up to the dike which is way [fol. 106] up here; the dredge goes up that way and makes a slice, goes back and makes another, and we are working that way. The land used to be way out in here.

Q. Now, this island here is Hardtack, isn't it?

A. Yes.

Q. And you are continually slicing away at it, are you?

A. Uh-huh.

Q. Dredging it off?

A. Uh-huh.

Q. I assume you are also dredging off the bottom of the lagoon also?

A. A hundred feet deep in places.

Q. Now, in the area that it is a hundred feet deep now, way back in,—when you started, I suppose, it was quite shallow, wasn't it?

A. Well, most of that area is about 20 feet above—in the part we are digging now was from 12 to 20 feet above zero water stage, it had big cottonwoods; we have taken big oak timber off four feet in diameter.

Q. What do you mean by "zero water stage"?

A. That is datum used here by the U. S. Engineers for all harbor construction, zero stage of the Willamette River.

Q. Does that mean the mean average or——

A. No. We have the mean average from mean average high, but then we also have the zero stage. We have minus zeroes like at the beach, if you are familiar with the tides, go clam digging, you have heard of low tides, it will be a [fol. 107] foot below zero, one foot six below zero. It is the same theory here on the Willamette as they have at the beach.

Q. I see. Do you moor any pleasure crafts in the—pleasure craft, that is pleasure boats, in the lagoon there?

A. Only very occasionally; the company boat is kept there occasionally. I have a small launch that I use to go sometimes from shore to the islands and occasionally down the river for inspections, and once in a while I keep it over there.

Q. Something like a captain's launch on a ship?

A. Yes, about like that.

Q. Now you mentioned pleasure craft coming into the lagoon area there on week-ends. Do they come in during the week also?

A. Very seldom; very seldom. Those people usually are——

Q. Working people?

A. —are out for recreation on Saturdays and Sundays.

Q. Well, if pleasure craft want to come in there while you are conducting certain loading or crushing or digging operations there, do you allow them to come in?

A. Well, we can't stop them.

Q. Well, if they want to come in there, say, when you are having a loading problem going on at the crushing plant, do you allow them to come in?

A. We have no control over them at all; they would come and go at will. We have to—we have to control our operations according to the rules of navigation on the river; they would keep away from our vessels and we keep away from them. We would be subject to marine damages if we had——

[fol. 108] Q. I am talking about the lagoon area now.

A. That is what I am talking about.

Q. Do they go clear up to the end of the lagoon?

A. Oh, yes, and tie their boat up and go up in the brush there and pick flowers.

Q. Have you ever had any accidents in there?

A. Please?

Q. Have you ever had any accidents in there?

A. Yes, we have.

Q. Involving pleasure craft?

A. No, no. We may have had but I—I don't recall them; none that I know of.

Q. Well,——

A. We had an accident with a barge turning over and we got into court on that.

Q. One of your own barges?

A. In the lagoon.

Q. One of your own barges?

A. Yes; one that we had at that time leased; it was being towed by another company, Portland Tug and Barge Company.

Q. You were mentioning about anybody coming in there or going out at pleasure. Is it your position that anyone could come in there and tie up a log raft?

A. No, they could not; we would run them off.

Q. Could anybody come in there and tow a log raft in and leave it there for a month?

A. If they didn't tie to shore, why, we would have no way [fol. 109] to stop them; it is navigable water.

Mr. Schwab: Well, I move that remark be stricken, your Honor.

The Court: The last part of the witness's answer will be stricken.

By Mr. Schwab:

Q. How about these log rafts that are tied out from shore some distance to these cement blocks that you were mentioning? Take this Exhibit 25 again, and looking at this raft right here how far would you say that was from shore?

A. Well, those rafts are about 50-60 feet wide. You can count it off there, one, two, three, four five, six; they are probably out three hundred fifty, sixty feet from shore.

Q. That is about 350 or 360 feet?

A. Sometimes that is a solid mass of rafts and we have to call them and ask them to come up and move their rafts so we can conduct our operations.

Q. I see.

A. We can't get a barge up between the rafts. Once in a while the wind will take them and blow them across and block the whole area.

Q. How wide would you say it was from this point over to this point (indicating)?

A. Couple thousand feet.

Q. Do you ever have——

A. Close to a half a mile at the extreme.

Q. Do you ever have rafts moored out right in the middle there?

[fol. 110] A. As I say, I have had them blocked so we couldn't get through.

Q. Now, what are those tied to——

A. Each other.

Q. —that are out in the middle?

A. Each other.

Q. Tied to each other?

A. Just like you take one boat alongside a dock and just

build them out in the stream until they were out there six deep.

Q. Where are these cement blocks?

A. I couldn't tell you. There are various mooring things we have scattered down there. Some, I think, are even lines from shore; I wouldn't know. The crew knows. I do know we have some down in here and one or two over in there.

Q. That is for the purpose of tying up these rafts?

A. No; those are put in there primarily for our own facilities to move our cranes with, to hold our floating equipment stable in the river.

Q. Your testimony was, I believe, that you did tie rafts to these cement blocks.

A. They do; I don't. I have nothing to do with that. If they want to tie to them they tie to them. When they are in our way I ask them to move.

Q. If somebody came up there and tied to one of those cement blocks and just left it there and didn't pay you a fee, what would you do about it?

[fol. 111] A. I would ask them to untie them and move away.

Mr. Schwab: That is all; thank you.

Mr. Denecke: No further questions.

(Witness excused)

Mr. Denecke: The defendant rests, your Honor.

Defendant Rests

The Court: Any rebuttal?

Mr. Schwab: No rebuttal, your Honor.

The Court: Do you have an amended Reply you are going to file?

Mr. Butler: Yes, we do, your Honor.

The Court: How long do you gentlemen figure the arguments are going to take; I mean on the motions you are going to make now?

Mr. Denecke: I think, your Honor, it will take to noon.

The Court: Probably.

Mr. Denecke: Between the two of us.

The Court: I was just going to let the jury know; there is no need to keep them aroun l here.

Ladies and gentlemen of the jury: The case is concluded as far as the testimony is concerned. There will be some motions and arguments which have to be made to the Court out of the presence of the jury, so as far as the jury is concerned you will take a recess to 2 o'clock this afternoon.

(Whereupon, at 10:40 A. M. the jury was excused, and the Court and respective counsel retired to chambers where the following proceedings were had out of the presence of the jury:)

[fol. 112] DEFENDANT'S MOTION FOR A DIRECTED VERDICT

Mr. Denecke: The defendant moves the Court to direct a verdict for the defendant on the grounds and for the reason that the evidence in the case shows that the plaintiff was injured on the navigable waters of the United States and that the plaintiff is otherwise within the purview of the Longshoremen and Harbor Workers' Compensation Act by reason of the fact that he was not a master or a member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons, and that the defendant had secured the payment of compensation under the Longshoremen and Harbor Workers' Act in a manner provided for in said Act, and that said Act provides that the sole and exclusive liability of the defendant for any injuries which the plaintiff may have incurred is that liability provided for under the Longshoremen and Harbor Workers' Compensation Act; and furthermore that the Compensation Act of the State of Oregon is not applicable because of the work in which the plaintiff was engaged at the time and because the injury occurred upon the navigable waters of the United States.

That is all the motion.

(Further argument and discussion off the record until a recess was taken to 2:00 P. M. of the same day.)

[fol. 113] (Friday, February 10, 1956, 2:00 o'clock P. M., pursuant to recess, proceedings were resumed in chambers, out of the presence of the jury, as follows:

RULING OF THE COURT

The Court: Gentlemen, after listening to your arguments and reading your authorities and studying them some more, and listening to the testimony in this case, the Court is of the opinion that this accident happened on navigable waters of the Willamette River.

The Court is further of the opinion that the uncontradicted testimony shows that the defendant Ross Island Sand & Gravel Company was engaged in interstate commerce, and I fail to see where it comes within the twilight zone following the Martinson case. I think Mr. Hahn's remedy is under the Longshoremen and Harbor Workers' Act, so I am going to allow the motion for directed verdict and allow an exception.

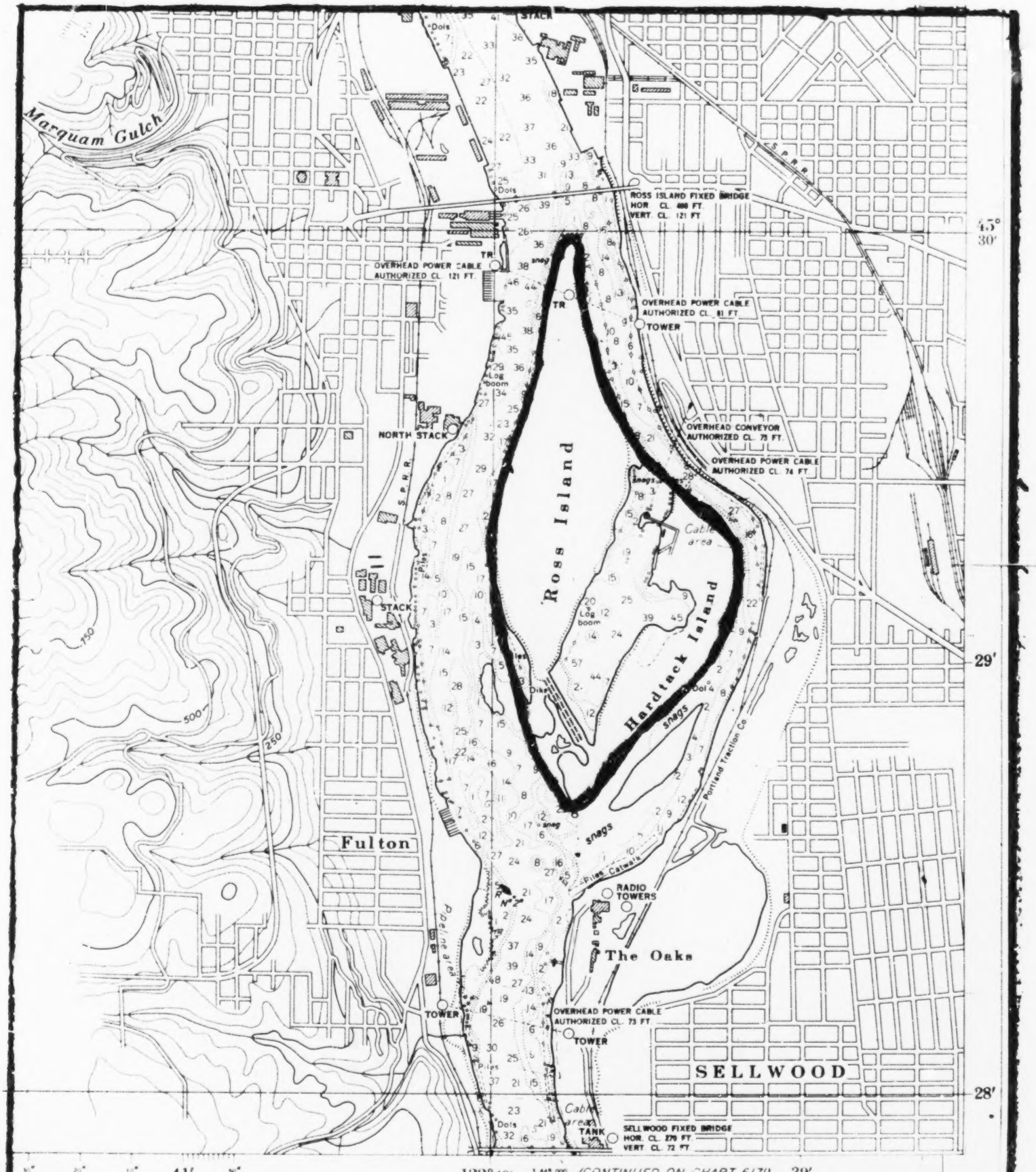
Mr. Schwab: Your Honor, we would like to have the matter submitted to the jury under the rule so we can get a jury determination.

(Discussion among the Court and counsel regarding plaintiff's motion.)

The Court: I will allow them to present the case to the jury with the understanding if the verdict comes in for the plaintiff I will set it aside and grant a verdict for the defendant, and allow an exception.

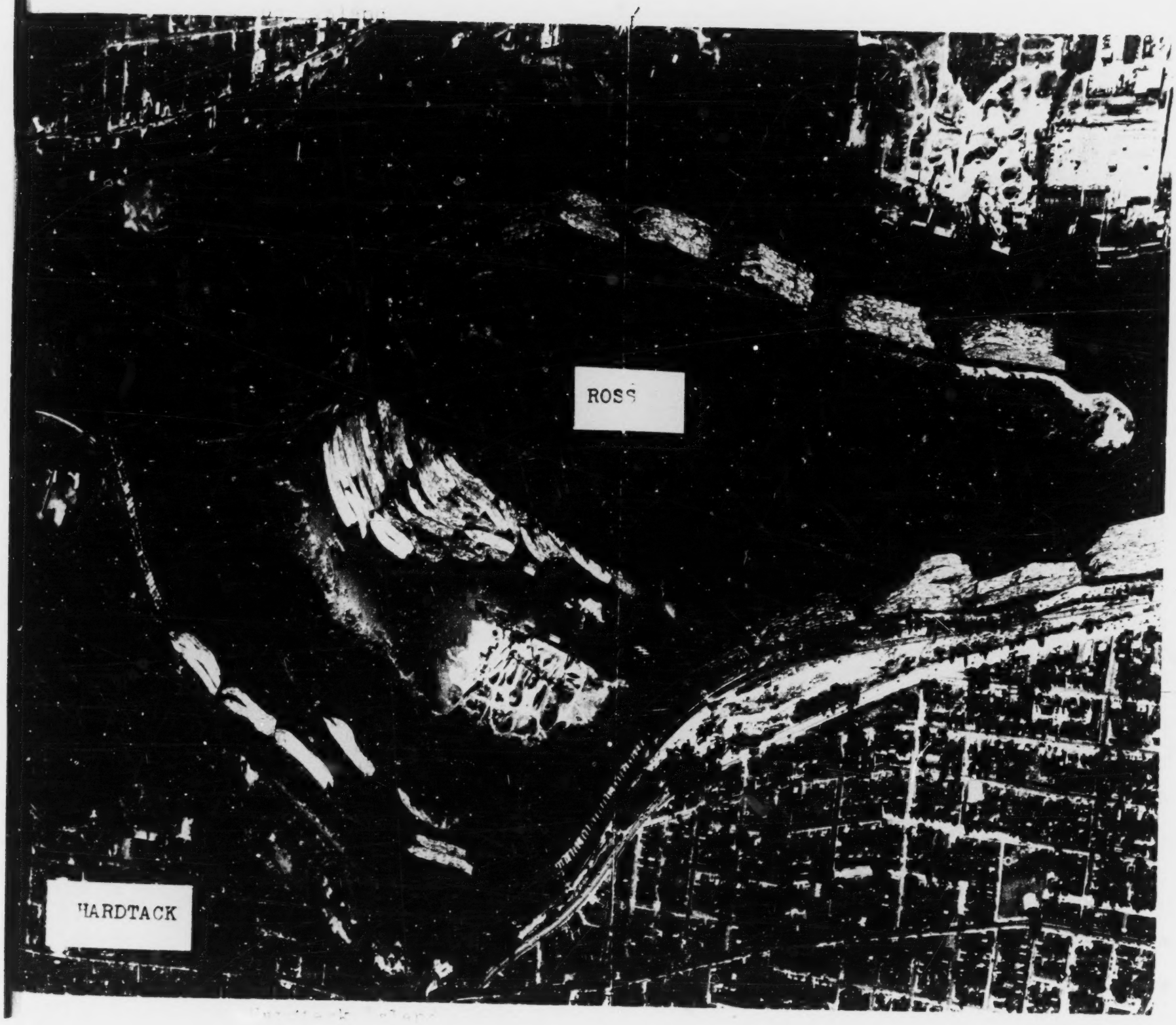
(Whereupon, closing arguments were presented to the jury by respective counsel, after which the Court instructed [fol. 114] the jury as to the law and the jury retired to deliberate upon its verdict.)

[fol. 115] Court Reporters Certificate to foregoing transcript (omitted in printing).


Marquam Gulch
STACK
Dols
S.P.R.R.
ROSS ISLAND FIXED BRIDGE
HOR. CL. 400 FT.
VERT. CL. 121 FT.
45°
30'
TR
OVERHEAD POWER CABLE
AUTHORIZED CL. 121 FT.
TR
OVERHEAD POWER CABLE
AUTHORIZED CL. 81 FT.
TOWER
Log boom
NORTH STACK
OVERHEAD CONVEYOR
AUTHORIZED CL. 75 FT.
OVERHEAD POWER CABLE
AUTHORIZED CL. 74 FT.
Ross Island
Hardtack Island
Cattle area
STACK
Piles
Log boom
Dikes
29'
750
500
250
snags
Portland Traction Co
Fulton
Piles Catwalk
RADIO TOWERS
The Oaks
Pipeline area
TOWER
OVERHEAD POWER CABLE
AUTHORIZED CL. 73 FT.
TOWER
SELLWOOD
28'
Cable area
TANK
SELLWOOD FIXED BRIDGE
HOR. CL. 270 FT.
VERT. CL. 72 FT.
41'
122°40'
1:445,000
(CONTINUED ON CHART 6171)
39'

[fol. 115B] EXHIBIT 4

(See Opposite)☞


ROSS
HARDTACK

[fol. 115C] EXHIBIT 10

(See Opposite)☞

[fol. 115D] EXHIBIT 25

(See Opposite)☞

[fol. 115E]

EXHIBIT A

Deed Book 60 Page 304.

The United States of America	)	
to	)	PATENT.
Rebecca F. Ross, widow,	)	

Dated May 5, 1873.

(Recorded November 20, 1882.)

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, GREETING:

WHEREAS, There has been deposited in the General Land Office of the United States, a Certificate Numbered 3122 of the Register and Receiver at Oregon City, Oregon, whereby it appears that under the provisions of the Act of Congress approved the 27th day of September 1850, entitled "An Act to create the Office of Surveyor General of the Public Lands in Oregon, and to provide for the survey and to make donations to settlers of the said Public Lands" and the legislation supplemental thereto, the claim of Rebecca F. Ross, widow, and the heirs at law of Sherry Ross, Deceased, late of Multnomah County, Oregon, Notification No. 582 has been established to a Donation of one section or six hundred and forty acres of land and that the same has been surveyed and designated as claim number 90 being parts of Sections 10, 11, 14 and 15 in Township 1 South of Range 1 East, according to the Official Plat of survey returned to the General Land Office by the Surveyor General, being bounded and described as follows, to wit:

(SEAL)

Beginning at the Meander post between said sections 10 and 15, and running thence North 21° East 15 chains and [fol. 115F] 60 links; thence North 12° 30′ East 25 chains and

80 links; thence North 5° 30′ East 5 chains and 70 links; thence south 28° East 4 chains and 50 links; thence south 21° East 16 chains and 40 links; thence south 23° East 13 chains; thence south 25° East 4 chains; thence south 12° East 6 chains; thence South 59° and 15′ East 12 chains and 50 links; thence South 50° 30′ East 7 chains and 80 links; thence South 26° East 5 chains and 10 links; thence south 1° and 30′ West 21 chains; thence south 35° West 30 chains and 20 links; thence south 45° West 6 chains; thence south 51° West 7 chains and 20 links; thence North 63° West 1 chain and 65 links; thence North 28° and 15′ West 20 chains and 80 links; thence North 66° West 1 chain; thence North 19° and 30′ West 4 chains; thence North 13° West 6 chains and 30 links; thence North 29° and 30′ West 8 chains; thence North 13° West 4 chains and 92 links; thence North 18° and 30′ West 3 chains; thence North 12° West 6 chains and thence North 11° East 15 chains and 40 links to the place of beginning in the district of lands subject to sale at Oregon City Oregon, containing 297 acres and 59 hundredths of an acre.

Now know ye, That the United States of America, in consideration of the premises and in conformity with the provisions of the act aforesaid have given and granted and by these presents do give and grant unto the said Rebecca F. Ross, widow, and to her heirs the West half and unto the heirs at law of the said Sherry Ross, deceased, the East half of the tract of land above described.

To have and to hold the said tract, with the appurtenances unto the said Rebecca F. Ross, widow and the heirs at law of the said Sherry Ross, deceased, and to their heirs and assigns forever, their respective portions as aforesaid.

(Seal)

[fol. 115G] In testimony whereof, I, Ulyssus S. Grant, President of the United States, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this 5th day of May in the year of our Lord One thousand Eight hundred and seventy three and of the Independence of the United States the 97th.

By the President: U. S. Grant

By: F. D. Williamson, Secretary.
C. B. Boynton, Recorder of the General Land Office.

(Seal of the General Land Office)

Recorded Vol. 9, Page 324.

Received for Record November 20th, 1882 at 2:P.M.

No. 7687

State of Oregon, }
County of Multnomah, } ss.

I, Si Cohn, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Patent (Deed Book 60 at page 304) The United States of America to Rebecca F. Ross, Widow

has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Patent as the same appears of record in my office and in my custody.

(Seal)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 7th day of February, A. D. 1956.

Si Cohn, County Clerk.
By /s/ M. Allen, Deputy.

[fol. 115H]

EXHIBIT B

G B #40044

ELROD ET UX TO ROSS ISLAND SAND & GRAVEL CO.

KNOW ALL MEN BY THESE PRESENTS That J O Elrod and Minerva L Elrod, husband and wife in consideration of Ten ($10.00) Dollars to them paid by Ross Island Sand & Gravel Co do hereby grant, bargain, sell and convey unto the said Ross Island Sand & Gravel Co., and unto its successors and assigns, all their right, title and interest in and to the following described parcel of real estate, situate in Multnomah County State of Oregon to-wit;

All of the Donation Land Claim of Sherry Ross and Rebecca F Ross, his wife being Claim No 90 and being parts of Sections 10, 11, 14 and 15, Township 1 South of [fol. 115I] Range 1 East of Willamette Meridian, bounded as follows; Beginning at the meander post between said Sections 10 and 15 and thence North 21 degrees E 15.00 chains; thence North 12 degrees 30 minutes E 25.80 chains: thence North 5 degrees 30 minutes E 5.70 chains; thence South 28 degrees E 4.50 chains; thence South 21 degrees E 16.40 chains; thence South 23 degrees E 13.00 chains; thence South 25 degrees E 4.00 chains thence South 12 degrees E 6.00 chains; thence South 59 degrees 15 minutes E 12.50 chains; thence South 50 degrees 30 minutes E 7.80 chains; thence South 26 degrees E 5.10 chains; thence South 1 degree 30 minutes W 21.00 chains; thence South 35 degrees W 30.20 chains; thence South 45 degree W 6.00 chains; thence South 51 degrees W 7.20 chains; thence North 63 degrees W 1.65 chains; thence North 28 degrees 15 minutes W 20.80 chains; thence North 66 degrees W 1.00 chains; thence North 19 degrees 30 minutes W 4.00 chains; thence North 13 degrees W 6.30 chains; thence North 29 degrees 30 minutes W 8.00 chains; thence North 13 degrees W 4.92 chains; thence N 18 degrees 30 minutes W 3.00 chains; thence North 12 degrees W 6.00 chains; thence North 11 degrees E 15.40 chains to place of beginning excepting therefrom two (2) parcels heretofore sold and conveyed, to-wit:

1. Beginning on line between Sections 11 and 14 Township 1 South Range 1 East of Willamette Meridian 89 degrees 35 minutes E 713.57 feet distant from corner of Sections 10, 11, 14 and 15 and thence North 41.83 feet to harbor line of Willamette River; thence South 54 degrees E 1048.45 feet thence West 848.21 feet; thence North 574.43 feet to beginning, containing six (6) acres, together with all riparian wharfage and shore rights incident or appertaining to said premises sold to Portland Motor Boat Co.,

2. The North end of Ross Island beginning at a large ash tree located near the East bank of the main island, about 210 feet South from the North timber line on said island and on a line running Northwesterly to a large cottonwood tree on the West bank of said Island situate in Section 10 in Township 1 South of Range 1 East of Willamette Meridian heretofore conveyed to the Windemuth Amusement Company but nevertheless granting, transferring and conveying any and all rights, privileges and benefits reserved to the grantors under the terms of said deed

Lots Seven (7) and Eight (8) of Section Fifteen (15) in Township One (1) South of Range One (1) East of Willamette Meridian, containing 16.59 acres, more or less.

All of that certain tract of land described as follows; Beginning at a stake in the East line of the Portland and Milwaukie Macadamized road 65 links Southerly from the Southwest corner of the Brickyard tract in Section 15 in Township 1 South of Range 1 East of Willamette Meridian, running thence South 75 degrees 30 minutes E parallel with the South line of the Brickyard tract 8 chains and 15 links to low water on the Willamette river; thence along low water line South 40 degrees W 62 links; thence North 75 degrees 30 minutes W parallel with the South line of said Brickyard tract 8 chains and 24 links to the East line of said Macadamized road; thence North 30 degrees 64 links along the East line of said road to the place of beginning, containing one-half acre of land, it being a part of the Terwilliger Donation Land Claim, excepting therefrom two (2) parcels of land heretofore sold and conveyed described as follows;

(SEAL)

1. Commencing at the Northwest corner of land sold by James Terwilliger to John Kiernan on January 17, 1876 in said Donation Land Claim in Section 15, Township 1 South of Range 1 East of Willamette Meridian, thence Southerly on the East line of McAdam Road 10 feet; thence Easterly parallel with North line of said tract to low water mark in Willamette River; thence Northerly with [fol. 115J] said low water mark on said river 10 feet to Northeast corner of said tract; thence Westerly on North line of said tract to beginning; being strip 10 feet wide off tract sold by Terwilliger to Kiernan as aforesaid and extending from said road to river off North side of said tract, and sold by John Kiernan and Sarah Kiernan, his wife to Charles Diett as shown by deed recorded in Book 30 page 211, Records of said Multnomah County.

2. A certain parcel of land conveyed by John Kiernan and Sarah Kiernan, his wife to the Portland & Willamette Valley Railway Co., as shown by deeds recorded in Book 99 page 97 Records of Deeds for said Multnomah County, and described as follows, to-wit; Commencing on the South line of half-acre tract conveyed in deed recorded in Book 28, page 499 Records of Deeds for said Multnomah County said point bearing South 75 degrees 30 minutes E 412 feet from the Southwest corner of said halfacre tract; thence Northerly and parallel to and 13 feet from the center line of Railway of second party 32 feet to South line of 10-foot strip described in deed recorded in Book 30, page 211, Records of Deeds for said Multnomah County; thence on South line South 75 degrees 30 minutes E 26 feet; thence Southerly parallel to and 13 feet from the center line of said Railway 32 feet to South line of said half-acre tract; thence on South line North 75 degrees 30 minutes W 26 feet to beginning, containing .02 acres.

TO HAVE AND TO HOLD the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said Ross Island Sand & Gravel Co., and to its successors and assigns forever.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 1st day of July A D 1926

Executed in the presence of

Jean McIntosh	J O Elrod	Seal
Jay Bowman	Minerva L Elrod	(Seal)

STATE OF OREGON)
} ss
COUNTY OF MULTNOMAH)

BE IT REMEMBERED That on this 1st day of July A D 1926 before me the undersigned a Notary Public in and for said County and State personally appeared the within named J O Elrod and Minerva L Elrod, husband and wife who are known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

IN TESTIMONY WHEREOF I have hereunto set my hand and Notarial Seal the day and year last above written

Beth S Wolfenden
Notary Public for Oregon

(Notarial Seal)

My Commission expires July 10, 1927

$350.00 US I R S (Cancelled)

Rec for record Aug 23, 1926 at 4:45 P M

[fol. 115K] STATE OF OREGON) ss
COUNTY OF MULTNOMAH)

I, Si Cohn, County Clerk and ex-officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, a Court of Record, do hereby certify that the above copy in DEED BOOK RECORDS is a correct transcript of the original as the same appears of record in my office and in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 8th day of February A.D. 1956.

SI COHN, COUNTY CLERK

By /s/ M. ALLEN

Deputy.

[fol. 115L] EXHIBIT C

(See Opposite)☞

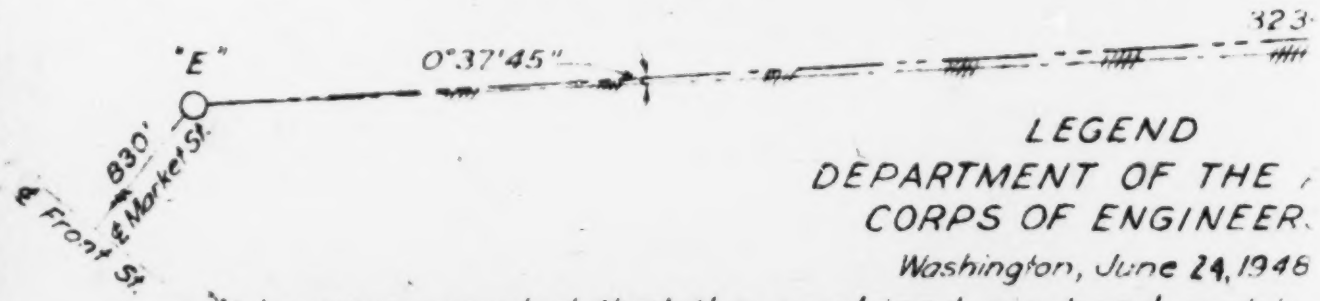
WAR DEPARTMENT

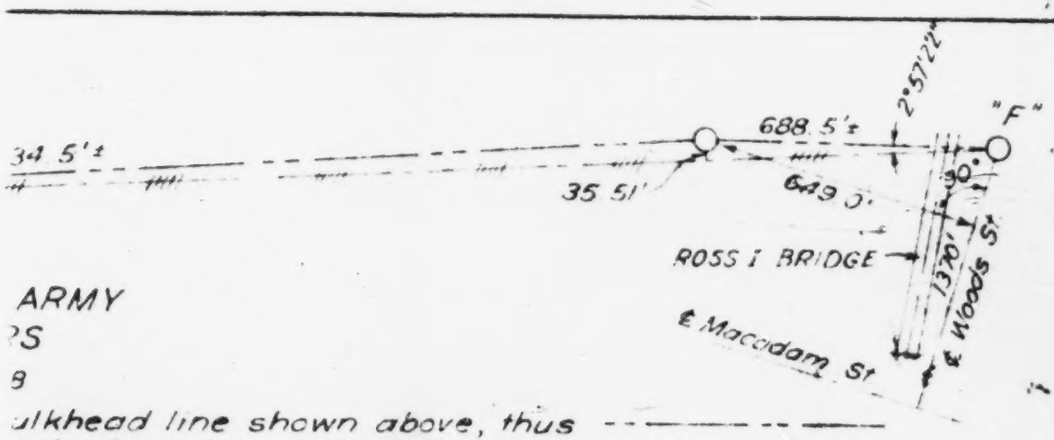
COORDINATES OF U.S.H.L. MONUMENTS AND 2 CITY TRIANGULATION MONUMENTS, HAWTHORNE BRIDGE TO CITY BOUNDARY ON SOUTH. THE ORIGIN OF COORDINATES IS THE INTERSECTION OF FRONT AND MADISON STS

STATION	SOUTH	EAST
H.L. Mon. [illegible] from Thomas St.	6808.76	306.93
H.L. Mon. [illegible] Loc. Co.	11035.34	435.19
H.L. Mon. [illegible]	12938.04	706.41
H.L. Mon. [illegible]	14501.90	930.63
H.L. Mon. [illegible]	16706.10	836.58
H.L. Mon. [illegible]	18034.47	1626.56
City Boundary Post	19198.36	1852.56
H.L. Mon. [illegible]	20455.44	4461.55
H.L. Mon. [illegible]	18951.94	4463.30
H.L. Mon. [illegible]	17911.94	4464.51
H.L. Mon. [illegible]	7283.92	2804.46
H.L. Mon. [illegible]	4422.39	3487.73
City Mon. [illegible]	7347.38	4394.28
City Mon. [illegible]	6661.41	4254.82
H.L. Point A	N.9270.29	W.2140.98
H.L. Point B	N.7965.42	W.485.76
H.L. Point C	N.8934.96	W.2534.55
H.L. Point D	N.2801.38	W.3957.80

U.S.H.L. Monument consists of bronze cap on iron pipe set in concrete except where triangulation station, city street monument or boundary post is used. Triangulation station consists of iron pipe set in concrete, with number of station

DETAIL "E-E" NEAR ROSS ISLAND BRIDGE





ARMY
PS
8

ulkhead line shown above, thus ---------
ede the existing line shown thus ---- ----

LEGEND
WAR DEPARTMENT

Office of the Chief of Engineers
Washington Dec. 27, 1928

It is recommended that the harbor lines shown and described on this map be established by the Secretary of War by his approval thereof, subject to the provisions of Section 11 of the River and Harbor Act approved March 3, 1899, this map to supersede all harbor line maps for these shores previously approved by the Secretary of War.

Edgar Jadwin
Edgar Jadwin
Major General, Chief of Engineers

WAR DEPARTMENT

Washington Dec. 29 1928

Approved

C. B. Robbins
Acting Secretary of War

rhead and bulkhead line defines the limit
ng and the limit to which open pile structures

ST.
ST.
ST.

CORPS OF ENGIN.

Under authority of the Chief of Engineers letter of Nov 5, 1927. E.D-7145(Willamette R)-7, this map in 2 Sheets is made to supersede the original harbor line map approved June 5, 1900, with all modifications & extensions approved up to and including Jan 7, 1927, also modifications tentotively approved Nov. 5, 1927. E.D-7145(Willamette R.)-7 and Mar. 6, 1928, E.D-7145(Willamette R.)-9

LEGEND

WAR DEPARTMENT

Office of the Chief of Engineers
Washington, June 15-1934

It is recommended that the combined pierhead and bulkhead line shown thus ——·——·—— between harbor line point "A" and point "B" be approved to supersede the existing line shown thus ////// - ////// between the same points.

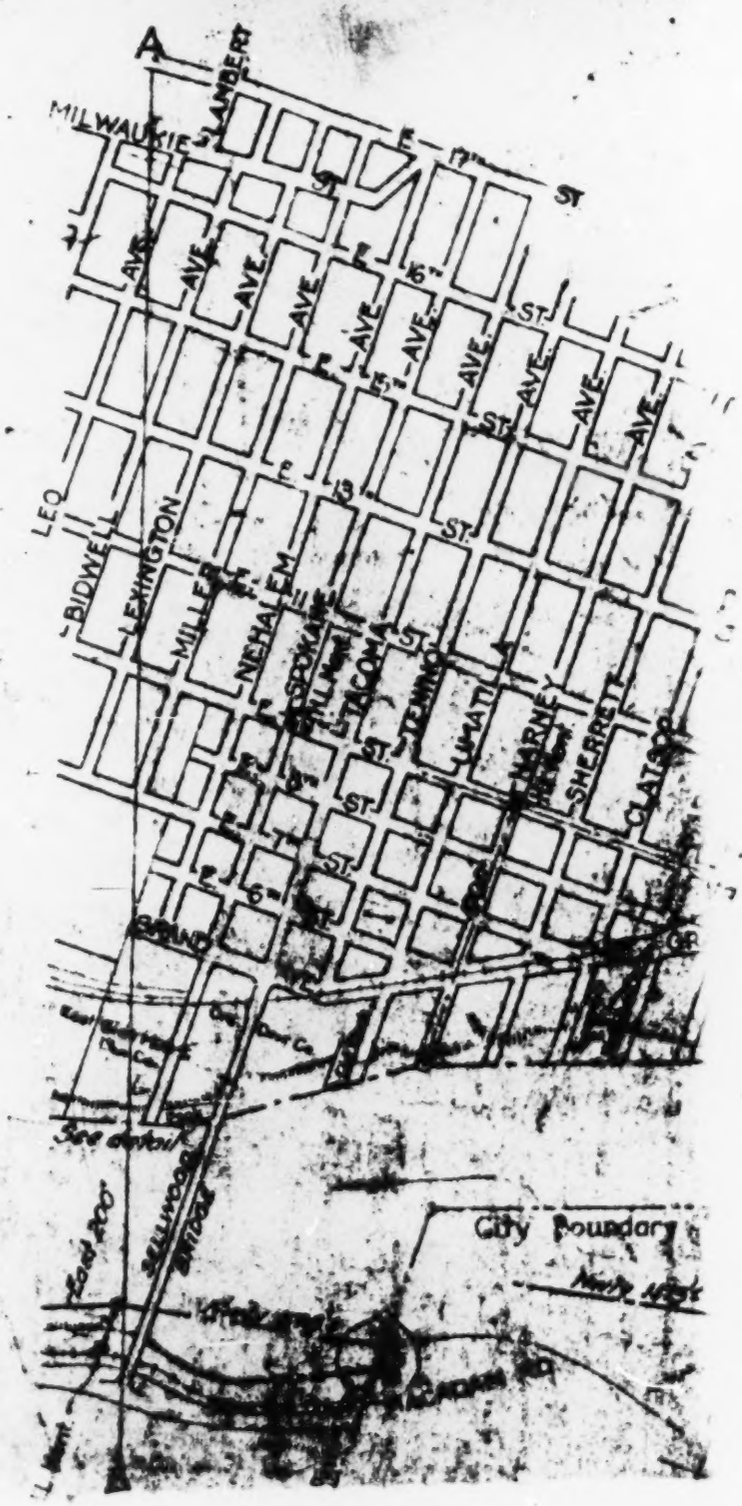
Major General Chief of Engineers

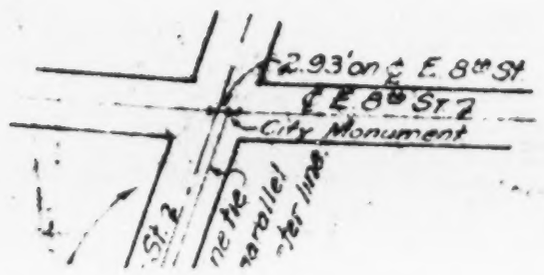
WAR DEPARTMENT

Washington, June 18, 1934.

Approved

Secretary of War





CORPS OF ENGINEERS, U.S. ARMY

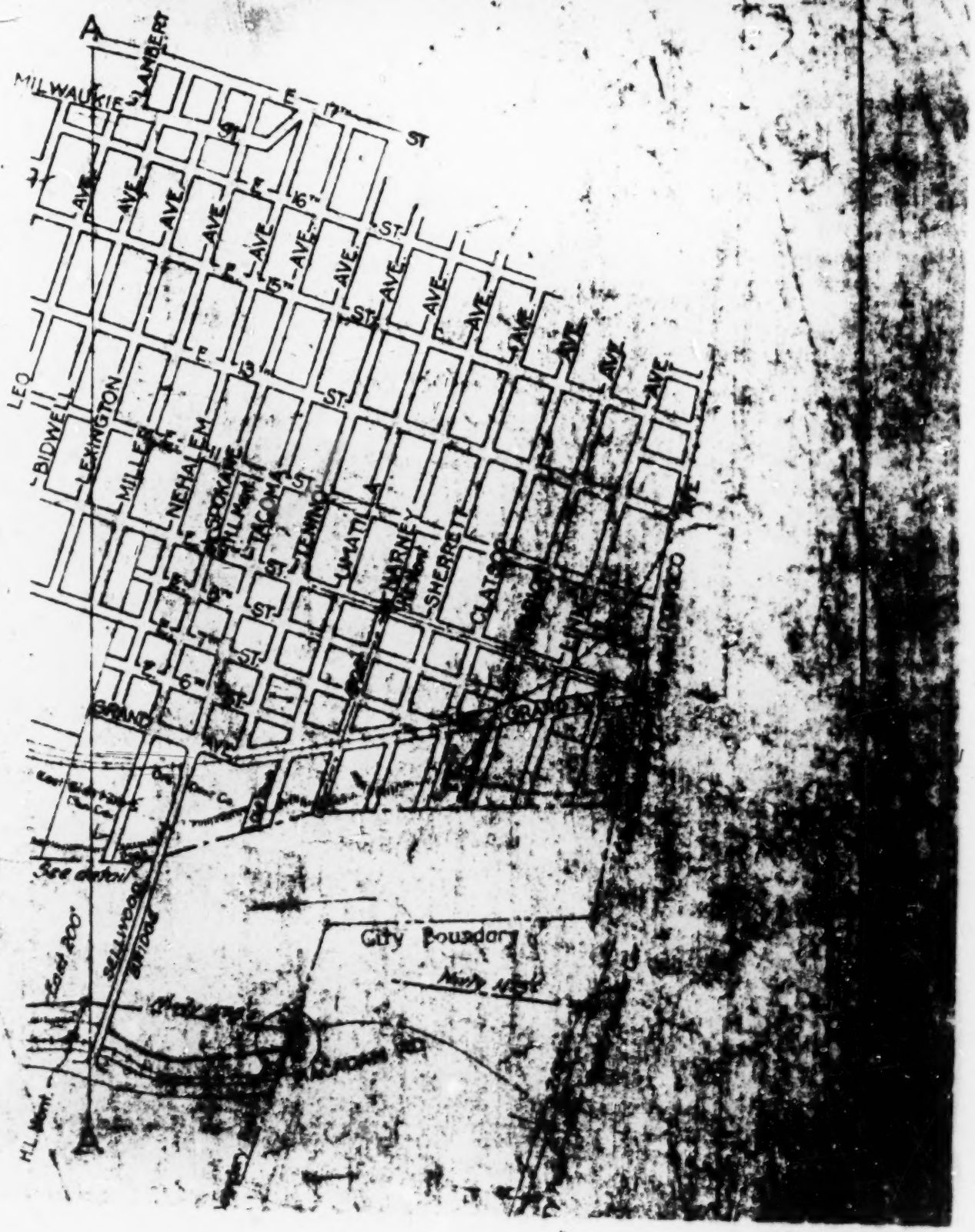
of Engineers letter of Nov 5, 1927.
Sheets is made to supersede the
June 5, 1900, with all modifications
cluding Jan 7, 1927, also modifications
- 7145 (Willamette R.) - J and Mar. 6, 1928.

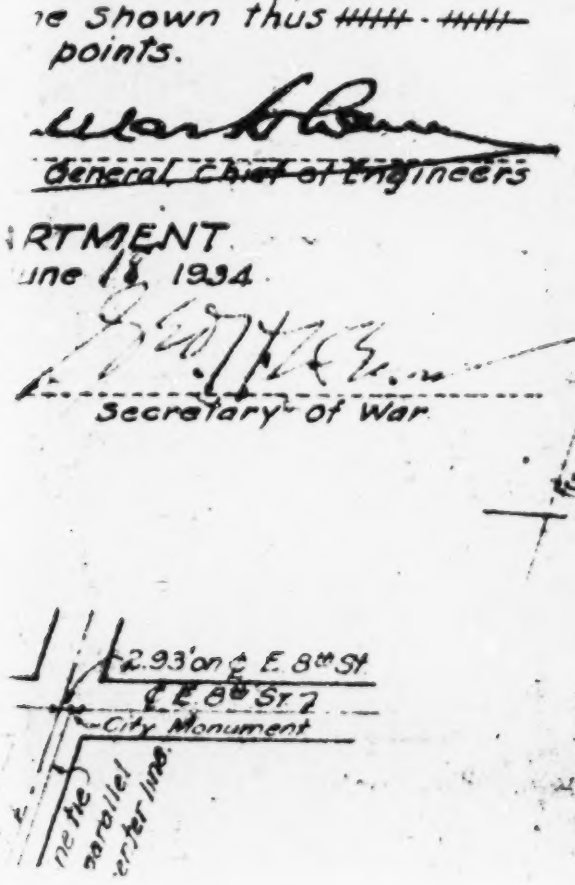
D
RTMENT
f of Engineers
June 15 - 1934
e combined pierhead and
——— between
oint "B" be approved to
e shown thus ##### - #####
points.

General, Chief of Engineers

RTMENT
une 15, 1934

Secretary of War





...nument or boundary post is used. Triangulation
...tion consists of iron pipe set in concrete, with number
...station.

528 S. line Dixon St. produced

NOTE

Combined pierhead of solid filling and ... may be built.

SACRAMENTO
EUGENE
SAN RAFAEL
VANCOUVER
WILLIAMS
VICTORIA
E. BROADWAY
WHEELER
CHERRY
HALSEY
E. CLACKAMAS
WASCO
MULTNOMAH
HASSALO
HOLLADAY
PACIFIC
OREGON
IRVING
E. HOYT
E. GLISAN
FLINT
GANTENBEIN
COMMERCIAL
KERBY
NORTHRUP
MORRIS
STANTON
ALBINA
GRAHAM
KNOTT
RUSSELL
ROSS
PAGE
DELAY
LARRABEE
THOMPSON
TILLAMOOK
KERBY
ROSS
DIXON
BENTON
HANCOCK
BROADWAY
CROSBY
MARGIN
ALAMEDA
OCCIDENT
WILLAMETTE
RAILROAD
UNION
FRONT
BROADWAY BRIDGE
RAILROAD
HARRISON
RANDOLPH
LEWIS
HARDING
LOVEJOY
SMITH
RIVER
BOONE
See detail above
See detail below
between arrows ... ties for points 58, Dock
given in detail
Irving Dock A
Lumber Terminal
Municipal Paving Plant "A"
Admiral Terminal
Pacific Coast Coal Co.
Crown Mills
Columbia Dock
Jersey Dock
H.L.Main
Railroad Yards
Railroad Tracks
UNION DEPOT
N.P. Freight Shed
P. Freight Shed
PARK
B.P.R.R. Freight Sheds
Globe
Gifford
Terminal No. 1
Terminal No. 2
Terminal No. 3
Terminal No. 4
Terminal No. 5
Terminal No. 6
Terminal No. 7
Terminal No. 8
Terminal No. 9
Terminal No. 10
Terminal No. 11
Terminal No. 12
Terminal No. 13
Terminal No. 14
Terminal No. 15
Terminal No. 16
Terminal No. 17
Terminal No. 18
Terminal No. 19
Terminal No. 20
Terminal No. 21
Terminal No. 22
Terminal No. 23
Terminal No. 24
Terminal No. 25
Terminal No. 26
Terminal No. 27
Terminal No. 28
Terminal No. 29
Terminal No. 30
Terminal No. 31
Terminal No. 32
Terminal No. 33
Terminal No. 34
Terminal No. 35
Terminal No. 36
Terminal No. 37
Terminal No. 38
Terminal No. 39
Terminal No. 40
Terminal No. 41
Terminal No. 42
Terminal No. 43
Terminal No. 44
Terminal No. 45
Terminal No. 46
Terminal No. 47
Terminal No. 48
Terminal No. 49
Terminal No. 50
Terminal No. 51
Terminal No. 52
Terminal No. 53
Terminal No. 54
Terminal No. 55
Terminal No. 56
Terminal No. 57
Terminal No. 58
Terminal No. 59
Terminal No. 60
Terminal No. 61
Terminal No. 62
Terminal No. 63
Terminal No. 64
Terminal No. 65
Terminal No. 66
Terminal No. 67
Terminal No. 68
Terminal No. 69
Terminal No. 70
Terminal No. 71
Terminal No. 72
Terminal No. 73
Terminal No. 74
Terminal No. 75
Terminal No. 76
Terminal No. 77
Terminal No. 78
Terminal No. 79
Terminal No. 80
Terminal No. 81
Terminal No. 82
Terminal No. 83
Terminal No. 84
Terminal No. 85
Terminal No. 86
Terminal No. 87
Terminal No. 88
Terminal No. 89
Terminal No. 90
Terminal No. 91
Terminal No. 92
Terminal No. 93
Terminal No. 94
Terminal No. 95
Terminal No. 96
Terminal No. 97
Terminal No. 98
Terminal No. 99
Terminal No. 100

LEGEND

City Street Monument.

Harbor Line (Combined pierhead & bulkhead line)

Notes:-

For the purpose of defining the harbor lines, the bearing of the ℄ of Macadam St. between Gibbs & Thomas Streets is taken as S1°28'40"W. the north line of Canby St. as S. 89°26'36"E. and the ℄ of East 8th St. north of Center St. as N.11°29'30"W.

Triangulation north of Railroad Bridge is based on U.S Coast & Geodetic Survey Stations Scott-Caples, bearing 341°39'32", log distance 3.9960093

Triangulation in vicinity of Ross Island (Sheet No1) is not connected with that north of Railroad Bridge except through City Street Surveys.

Where ties to harbor line points are not given, see enlarged details.

Soundings are in feet and show the depth at low water.

WILLAMETTE

See Detail Above

See detail below

Combined pierhead & b

SOUTHERN PACIFIC RY

P.E.P. Co Yards

Thirty Foot Channel

Supplee Dock

Columbia Co

Hawthorne Dock

Taggart Dock

Dock

Log Loading Place

Grand Mill Dock

Morrison Bridge

Hawthorne Bridge

Ross Island Bridge

Burnside Bridge

Front

Water

Grand Ave

Union Ave

Davis

Couch

Everett

Flanders

Burnside St

Lankeny

Pine

Ankeny

Stark

Washington

Alder

Morrison

Yamhill

Taylor

Salmon

Main

Madison

Hawthorne

Clay

Market

Mill

Stephens

Harrison

Lincoln

Grant

Sherman

Caruthers

Division

Clinton

Woodward

Brooklyn

Holly

Beacon

Park

Broadway

Yamhill

Taylor

Jefferson

Columbia

Water

Front

Harbor

Lake

Ladd

Bridge

Hill

Dock

Log Pond

Ferry

Boom

Pier

Ferry Slip

Log Pond

Log Loading Place

Sawmill Dock

Tacoma Dock

Columbia Co Dock

Supplee Dock

Thirty Foot Channel

oved

Secretary of War

S. 150'

2.93' on ℄ E. 8th St.

℄ E. 8th St. ?

City Monument

℄ Center St.?

Harbor line the may not parallel street center line

See detail

Wood Bridge

City Boundary

Mark West

H.L. Mark

MS. LAUGHLIN ST

LAFAYETTE ST

RHONE

BUSH

CENTER

BOISE

CORA

MALL

REYNOLDS

HOLGATE

CROOKHAM

SCHILLER

MITCHELL ST

INSLEY

HAROLD

CAIN

CRAMPTON

LAVERN ST

MILWAUKIE

E. 10th

E. 13th

E. 14th

E. 15th

E. 16th

E. 17th

AVE

ST

N 22° W 500'

N 5° E 1000'

N 20° 15' W 530'

N 3° E 800'

N 54° W 1200'

N 54° W 1700'

N 19° 25' 36" W 704.57

N 34° 45' W 587'

N 45° 15' W 630'

N 30° 30' E 2700'

N 22° E 2600'

N 39° E 980'

N 55° E

30' W 2794'

Pacific Inland Sand & Gravel Co

Landing Terminal

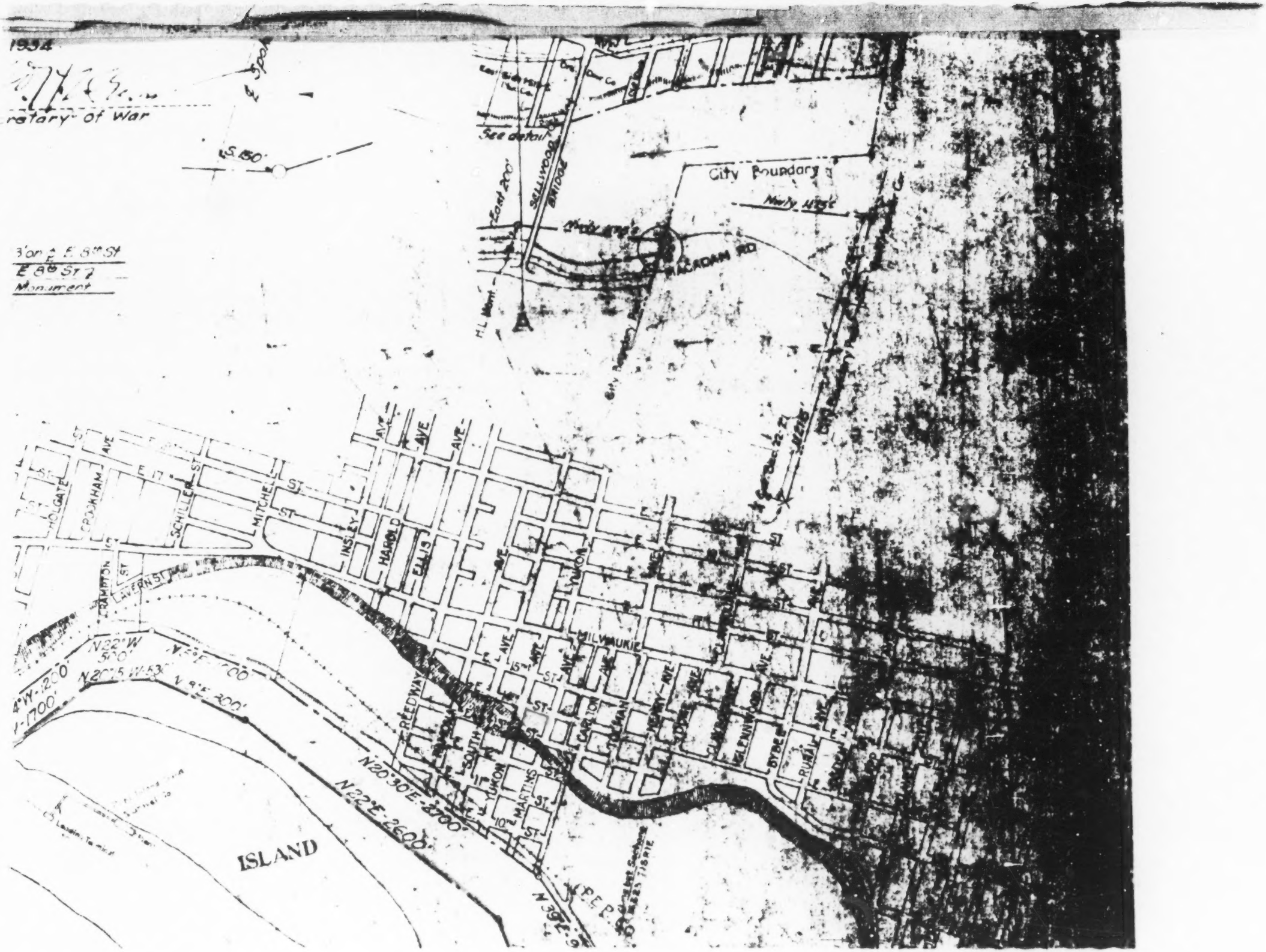
Plant

ISLAND

ROSS

S 13° 1930' from ℄ Macadam St

S 108'


1934
Secretary of War
E Spook
See detail
City Boundary
Holy Angel
Holy Angel
Sellwood Bridge
Ford 200'
Ramp
Ramp
Ramp

Oklahoma Ford

City [illegible] Post	20455.44	4461.55
H.L.M. or City Boat @ E 9th St.	18951.94	4463.30
H.L.M. @ Memorial Bridge	17911.94	4464.51
H.L.M. @ Spokane St. @ E 99th St.		

See detail below

Municipal Paving Plant

Union Pacific Railroad

Great Mills

Pacific Coast Co

Admiral Terminal

Terminal No 1

Western Lumber Co

Lumber

NORTH FRONT

HLM

AVE

ST

BROADWAY

DAVIS

COUCH

EVERETT

QUIMBY

MARSHALL

KEARNEY

JOHNSON

IRVING

LANDER

BLACKSTONE

FAIRBANKS

GUILD

YORK

SCOSTEL

WILSON

VAUGHN

UPSHUR

THURMAN

SAWTER

RALEIGH

INDUSTRIAL AVE

WARDWAY

FRONT ST

East line of Broadway produced after widening in 1912.

East line of Broadway produced before widening in 1912.

992.6
1240.8

Edgar Jadwin

Edgar Jadwin

WILLAMETTE

See Detail Above

See Detail Below

"E"

"F"

MAIN THORNS. 90°

432.5 to Front St

WATER

FRONT

PARK

WASHINGTON

STARK

ALDER

BROADWAY

MORRISON

YAMHILL

TAYLOR

SALMON

MAIN

MADISON

JEFFERSON

COLUMBIA

CLAY

MARKET

MILL

MONTGOMERY

HARRISON

COLLEGE

JACKSON ST

LINCOLN

GRANT

SHERMAN

CARUTHERS

SHERIDAN

ARTHUR

MEADE

HOOKER

PORTER

WOODS

GRover

GIBBS

WHITAKER

CURRY

PENNOYER

GAINES

LANE

TERWILLIGER

MOODY

HOOD

MACADAM

KELLY

CORBETT

ABERNETHY

ASH

PINE

OAK

VINE

ANKENY

BURNSIDE

COUCH

E WOODS ST

L G Sperry Co

Dollar Portland Lbr Co

Dock

Pile

Ferry Slip

Ferry Landing

Public Landing

Steps

Boat House

Ice House

Smith & Watson

Bade & Sons

Johnson & Wood

Shipbuilding Ways

Railroad

Tracks

Roadway

Paved

Sidewalk

Curb

Gutter

Fence

Bridge

Ramp

Stairs

Pole

Hydrant

Manhole

Catch Basin

Sewer

Water

Gas

Telephone

Electric

Conduit

Trolley

Overhead Wires

Building

Brick

Frame

Concrete

Stone

Iron

Wood

Shed

Tank

Tower

Chimney

Flagpole

Sign

Clock

Bench

Mail Box

Fire Alarm

Telephone Booth

Parking Meter

Traffic Light

Traffic Signal

Crosswalk

Intersection

Property Line

Lot Line

Block

Lot

Number

Name

Address

Elevation

Contour

Grade

Slope

Retaining Wall

Embankment

Cut

Fill

Drainage

Culvert

Pipe

Manhole

Catch Basin

Inlet

Outlet

Flow

Direction

Distance

Bearing

Angle

Curve

Tangent

Radius

Chord

Arc

Point

Line

Survey

Monument

Benchmark

Control Point

Traverse

Triangulation

Station

Offset

Baseline

Meridian

Township

Range

Section

Quarter

Corner

Boundary

Easement

Right of Way

Dedication

Vacation

Annexation

Zoning

Use

Density

Setback

Height

Area

Perimeter

Scale

North

Grid

Coordinate

Datum

Projection

Legend

Title

Date

Author

Source

Notes

Revision

Approval

Seal

Signature

Witness

Notary

Acknowledgment

Deed

Mortgage

Lien

Tax

Assessment

Value

Improvement

Land

Total

Exempt

Taxable

Rate

Levy

Collection

Delinquent

Penalty

Interest

Abatement

Refund

Appeal

Hearing

Board

Commission

Council

Ordinance

Resolution

Motion

Vote

Yea

Nay

Abstain

Absent

Quorum

Majority

Minority

Unanimous

Tie

Veto

Override

Effective

Repeal

Amend

Supersede

Codify

Publish

Post

Notice

Hearing

Public

Comment

Testimony

Exhibit

Record

Transcript

Minutes

Agenda

Calendar

Schedule

Deadline

Extension

Continuance

Postponement

Cancellation

Rescheduling

Adjournment

Recess

Session

Meeting

Workshop

Conference

Seminar

Training

Orientation

Briefing

Report

Memorandum

Letter

Email

Phone

Fax

Mail

Delivery

Pickup

Courier

Messenger

Express

Priority

Urgent

Confidential

Personal

Private

Public

Open

Closed

Sealed

Unsealed

Filed

Docketed

Assigned

Reassigned

Transferred

Referred

Forwarded

Returned

Rejected

Accepted

Approved

Denied

Pending

Withdrawn

Dismissed

Settled

Compromised

Litigated

Arbitrated

Mediated

Negotiated

Drafted

Reviewed

Revised

Finalized

Executed

Recorded

Filed

Archived

Destroyed

Shredded

Deleted

Backed Up

Restored

Migrated

Converted

Scanned

Indexed

Searched

Retrieved

Copied

Printed

Faxed

Emailed

Mailed

Delivered

Picked Up

Signed

Witnessed

Notarized

Sealed

Stamped

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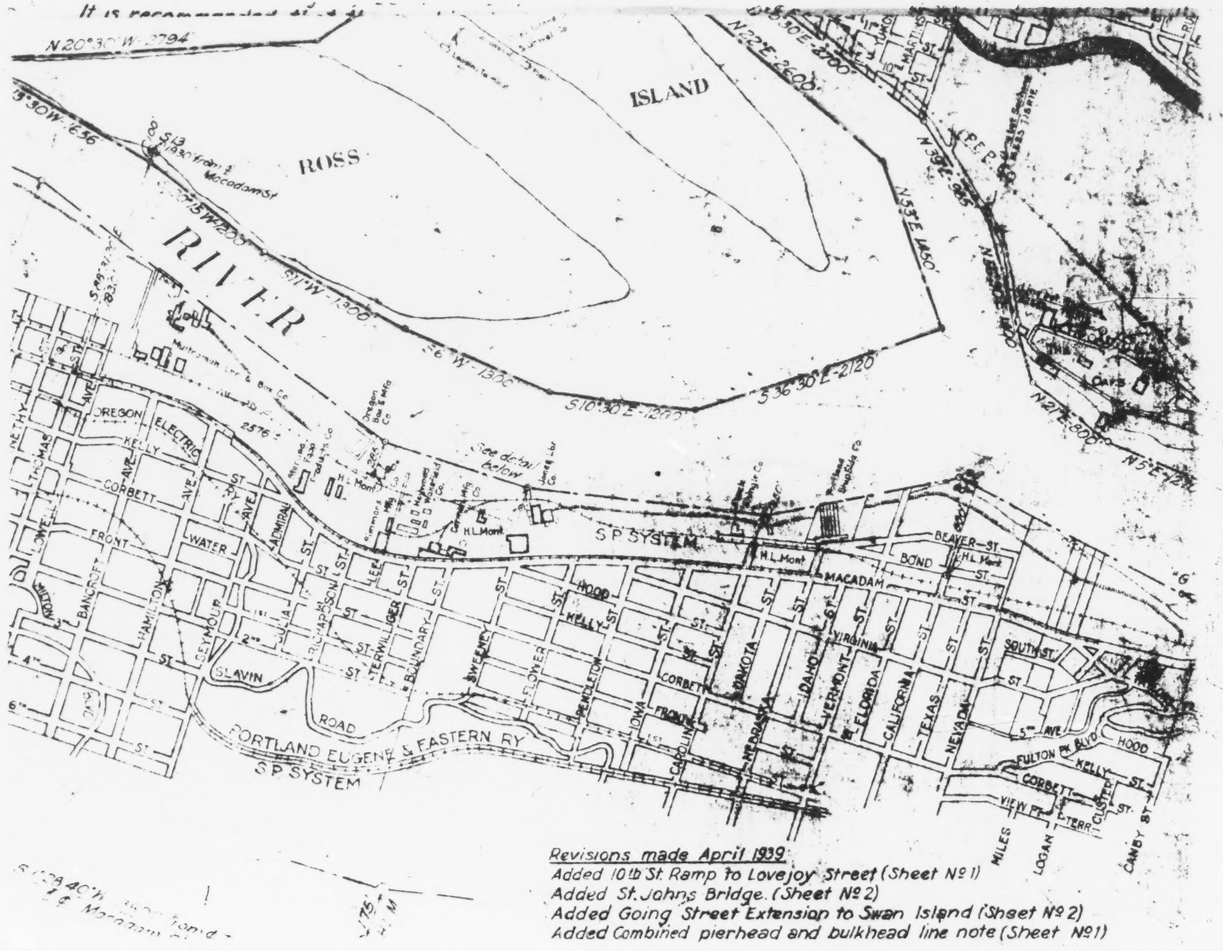
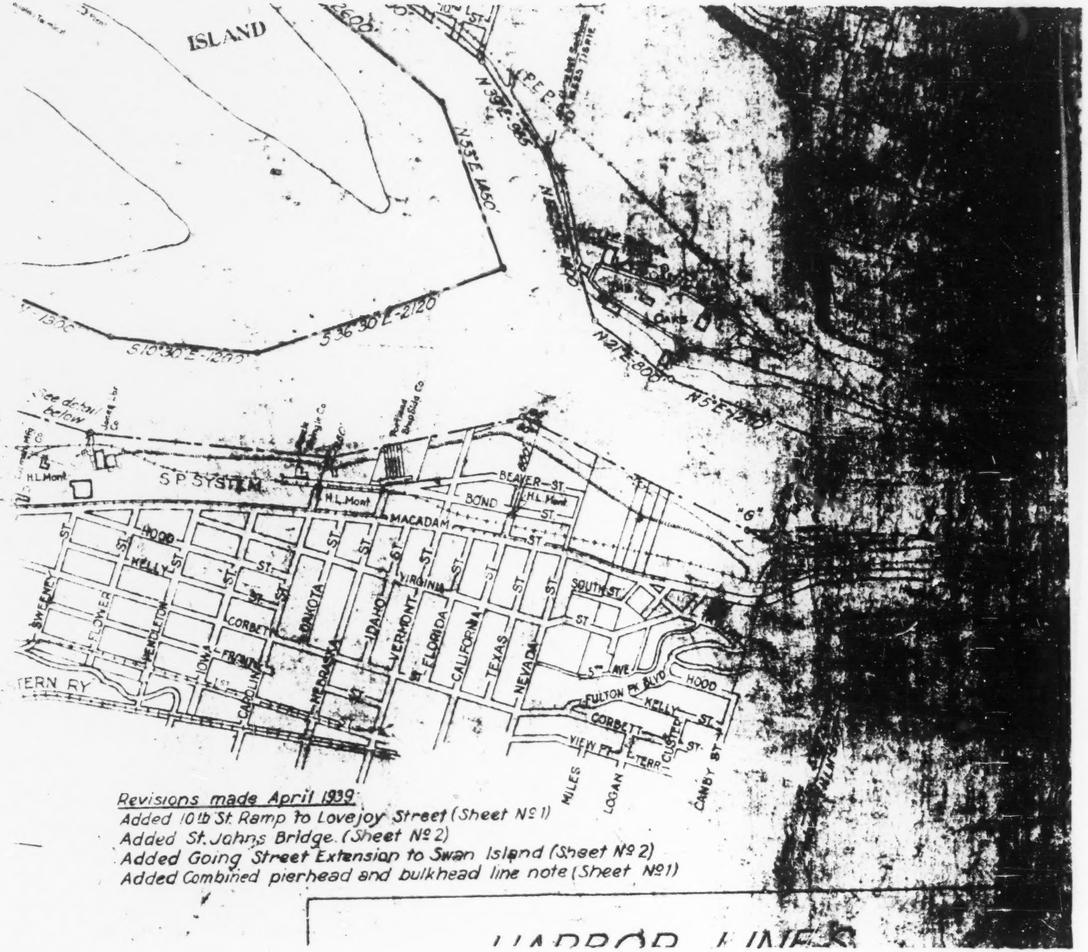


Revisions made April 1939
Added 10th St. Ramp to Lovejoy Street (Sheet No 1)
Added St. Johns Bridge. (Sheet No 2)
Added Going Street Extension to Swan Island (Sheet No 2)
Added Combined pierhead and bulkhead line note (Sheet No 1)



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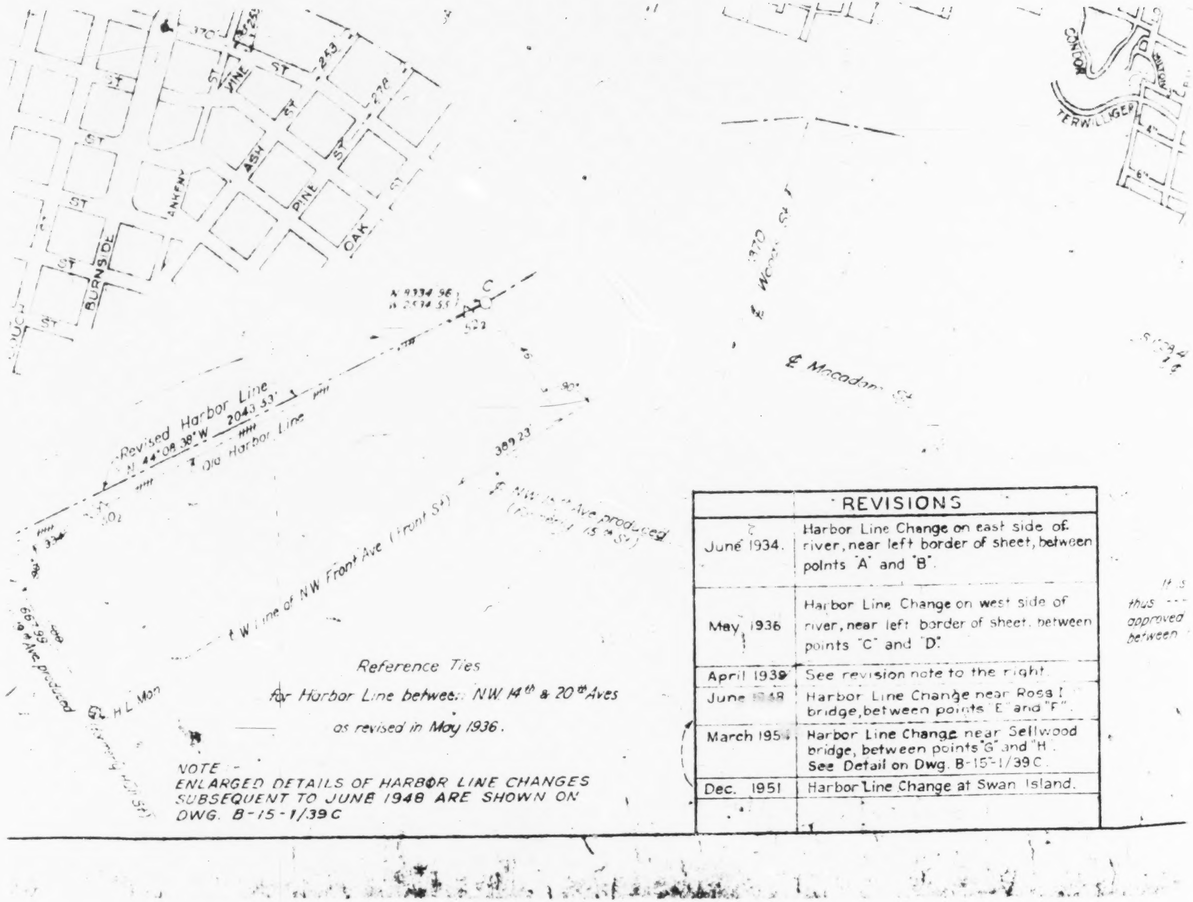
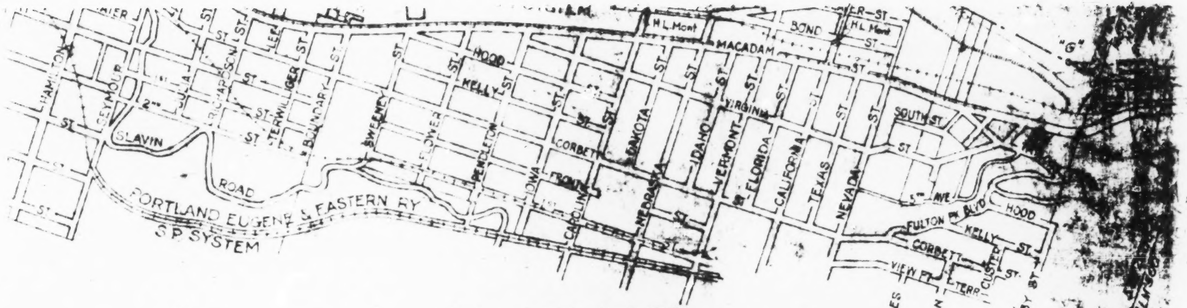


	REVISIONS
June 1934.	Harbor Line Change on east side of river, near left border of sheet, between points "A" and "B".
May 1936	Harbor Line Change on west side of river, near left border of sheet, between points "C" and "D".
April 1939	See revision note to the right.
June 1948	Harbor Line Change near Ross Island bridge, between points "E" and "F".
March 1954	Harbor Line Change near Sellwood bridge, between points "G" and "H". See Detail on Dwg. B-15-1/39C.
Dec. 1951	Harbor Line Change at Swan Island.



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Added Going Street Extension to Swan Island (Sheet No 2)
Added Combined pierhead and bulkhead line note (Sheet No 1)

LEGEND
WAR DEPARTMENT
Office of the Chief of Engineers
Washington, June 2, 1936.

mmended that the combined pierhead and bulkhead line shown
– – – – – – – – between harbor line points C and D be
supersede the existing line shown thus - ### - ### - ###
ame points.

Major General, Chief of Engineers.

WAR DEPARTMENT
Washington, June , 1936

pproved:

Secretary of War.

HARBOR LINES
WILLAMETTE RIVER
AT PORTLAND OREGON

IN 2 SHEETS

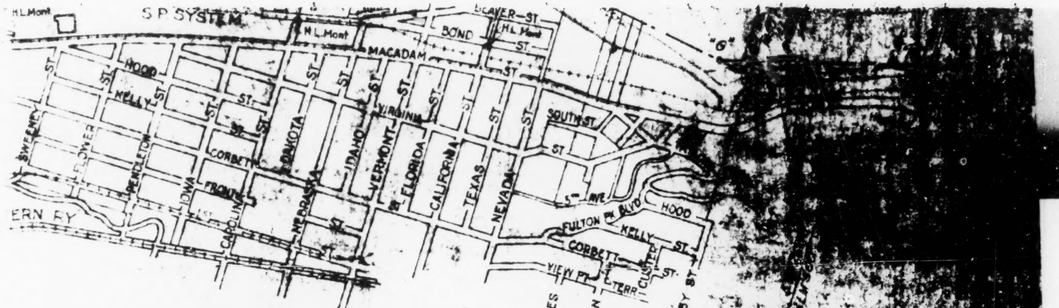
Scale of Feet
500' 0 500' 1000' 1500'

U.S. ENGINEER OFFICE, PORTLAND OREGON

Submitted
R.E. Hickson
Engineer

Drawn by S.E.M. & W.B.P.
Traced by W.B.P.

BWP5-G+-39"A"



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WILLAMETTE RIVER
AT PORTLAND OREGON

IN 2 SHEETS

Scale of Feet
500' 0 500' 1000' 1500'

U.S. ENGINEER OFFICE, PORTLAND OREGON

Submitted
R.E. Hickson
Engineer

Drawn by S.E.M. & W.B.P.
Traced by W.B.P.

BWP5-G+-39"A"

[fol. 115M] EXHIBIT D

(See Opposite)☞

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IN CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

CERTIFICATE OF TRIAL JUDGE—April 16, 1956

The foregoing Bill of Exceptions was presented and tendered to the Court by the plaintiff on the 13th day of April, 1956.

The Court hereby certifies that said Bill of Exceptions contains a full and correct record of said exceptions; all of the testimony introduced by the respective parties at the trial of the above cause; the exhibits offered and received or rejected, except that the transcript of proceedings made a part of the Bill of Exceptions by reference does not indicate that defendant's Exhibit 1 and plaintiff's Exhibits A, B, C and D were received in evidence, whereas in fact said exhibits, and each and every one of them, were received in evidence without objection; all stipulations of the parties by their respective counsel, and while the transcript of proceedings does not expressly so indicate, the stipulations dictated into the record by Mr. Buttler and appearing on pages 7, 96 and 97 of said transcript, counsel for each of the respective parties stipulated to all of said statements; all motions and objections made by counsel and the rulings of the Court thereon; the exceptions taken and allowed by the Court, except that the Bill of Exceptions does not include any instructions given by the Court to the Jury or any instructions requested by either of the parties to be given by the Court to the Jury, there having been no exceptions taken by either of the parties to any of the instructions given by the Court or to the failure of the Court to give any of the instructions requested by either of the parties or to the modification by the Court of any of the instructions requested by either of the parties; the verdict of the Jury in favor of the plaintiff; the Judgment entered on said verdict for the plaintiff; the plaintiff's Cost Bill duly served, filed and allowed; defendant's motions for judgment for defendant notwithstanding the verdict for plaintiff, served and filed by defendant, and the judgment order allowing defendant's

motion for judgment for defendant notwithstanding the verdict and entering judgment for defendant.

The foregoing Bill of Exceptions is, therefore, hereby settled, approved and allowed this 16th day of April, 1956.

James R. Bain, Judge.

[fol. 117] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

HARRY A. HAHN, Appellant,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Respondent.

Appeal from Circuit Court, Multnomah County.

James R. Bain, Judge.

Argued and submitted November 20, 1957.

Dwight L. Schwab argued the cause for Appellant. On the briefs were Hutchinson, Schwab & Burdick and John H. Buttler, Portland.

Arno H. Denecke argued the cause for Respondent. On the brief were Mautz, Souther, Spaulding, Denecke & Kinsey, Portland.

LUSK, J.

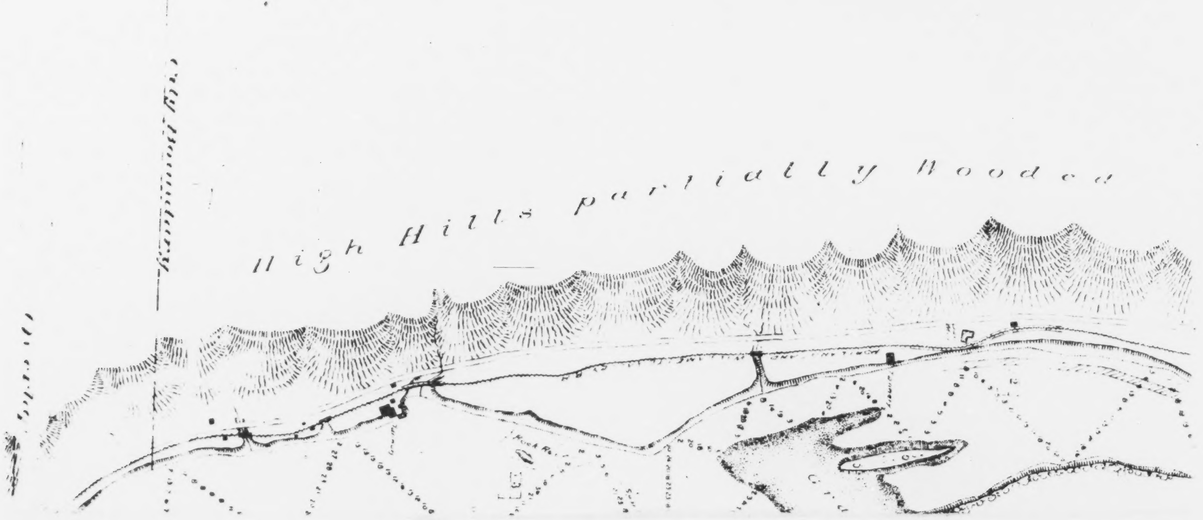
Affirmed.

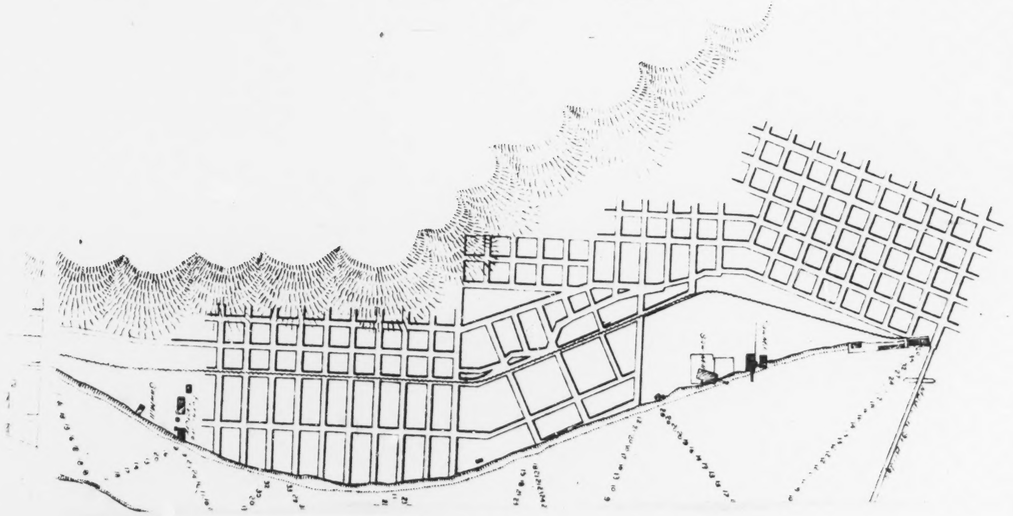
[fol. 118] OPINION—Filed January 22, 1958

LUSK, J:

This is a personal injury action under the Oregon Employers' Liability Act in which the court set aside a verdict

CITY OF PORTLAND





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for the plaintiff and entered judgment for the defendant notwithstanding the verdict. The plaintiff has appealed. The action of the trial court was based upon the view that plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 USC, Title 33, §§901 et seq.). This ruling presents the only question on this appeal.

The defendant is an Oregon corporation which operates a sand and gravel business on the Willamette River in Portland. It conducts dredging operations with the use of a dredge, barges and power-driven machinery in a portion of the river referred to in the testimony as a lagoon—a small bay or inlet roughly rectangular in shape, the entrance to which from the main body of the river is at the north. Otherwise, it is surrounded by land—Ross Island on the west, Hard Tack Island on the east, and a strip of land on the south connecting the two.

On the day that plaintiff was injured, March 23, 1955, and for some eight days prior thereto, he was employed by the defendant as an "oiler." His general duties were on a dredge anchored to the shore, which was used to scoop out sand and gravel from the bottom of the lagoon and dump it on a barge. He looked after the machinery of the dredge and operated a winch to move the barge into position. If there was a breakdown in the machinery it was his duty to repair it. The barge, when filled, was moved to the crusher, which was located inside of the lagoon, and, after the gravel was crushed, it was carried by means of a conveyor belt to the defendant's plant on the right bank of the river. He was injured, however, while performing a dif- [fol. 119] ferent type of work. He was ordered to assist in transferring a large gravel bin or hopper, used for loading sand and gravel into trucks, from one barge to another. The hopper was so constructed that trucks could be driven under it to receive their loads. A power-driven crane on shore was employed to pick up the hopper and move it. After the hopper was moved and stowed it became the plaintiff's job to go to the top of the hopper by means of a ladder nailed to the hopper and loosen a cable used in the moving operation. He had climbed high enough to reach the top rung of the ladder with his hand when the ladder

gave way, and he fell a distance of about eight or ten feet, landing on his back on hard-packed sand in the barge and receiving serious injuries. The ladder fell upon him. The evidence shows that the ladder, which was constructed of heavy timbers, was fastened to the hopper only by nails which had been driven into wood that was rotten. No bolts or chains were used to make it secure, although it was practicable to use them. There seems to be no question about the negligence of the defendant or its violation of the provisions of the Employers' Liability Act.

In 1927 Congress passed the Longshoremen's and Harbor Workers' Compensation Act in order to provide compensation irrespective of fault for injury or death in the case of employees of employers "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." USC, Title 33, §902 (4). Section 903 (a) provides in part:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the [fol. 120] United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Liability of an employer as prescribed by the Act is made exclusive, but, if any employer fails to secure payment of compensation as required by the Act, an injured employee, or his legal representative in case death results from the injury, is given an election to claim compensation or to maintain an action at law or in admiralty for damages, in which case the defenses of negligence of a fellow servant, assumption of risk, and contributory negligence are not available to the employer. §905.

The defendant had secured payment of compensation as required by the federal Act, §932, but had exercised its election not to be subject to the Workman's Compensation Law of this state (ORS 656.022).

It is contended first, on the part of the plaintiff, that the injury did not occur upon "navigable waters of the United States," but as to this we think that there can be little doubt. The body of water upon which the injury occurred is a portion of the Willamette River, which is concededly a navigable stream. Willamette Iron Bridge Co. v. Hatch, 125 US 1, 8 S Ct 811, 31 L ed 629; Port of Portland v. Reeder, 203 Or 369, 280 P2d 324. Tugs, the largest of which has a draft of nine feet, ply in and out of the lagoon. The hopper upon which plaintiff met with his injury was towed in a barge by tug owned and operated by the defendant to the lagoon from Sun Dial Beach on the Sandy River, a tributary of the Columbia River, and afterwards was taken by the same means to Cathlamet on the Columbia River in the state of Washington. The tug referred to was 50 feet long. It was used to tow sand and gravel "from one job to another," going at times to Ilwaco, Washington, about three miles from the mouth of the Columbia River and up the Columbia as far as the Bridge of the Gods.

The test for determining what are navigable waters of the United States was thus stated by Mr. Justice Field in The Daniel Ball, 77 US 557, 563, 19 L ed 999:

> [fol. 121] " * * * The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navi-

gable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

See, also, Crowell v. Benson, 285 US 22, 55, 52 S Ct 285, 76 L ed 598; Dailey v. City of New York, 128 Fed 796 (SD NY 1904); I Benedict on Admiralty (6th ed) 94-96.

The evidence discloses that the body of water in question fully meets this test. It is navigable in fact and therefore in law, and forms "by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." The fact that the defendant owns the land partially surrounding the lagoon does not militate against this conclusion. United [fol. 122] States v. Chicago, M & St. P. & P. R. Co., 312 US 592, 596-597, 61 St Ct 772, 85 L ed 1064. The government has drawn harbor lines around the land, but whether water is inside or outside harbor lines is not a test of navigability. See Port of Portland v. Reeder, supra. People v. The Commissioners of Land Office, 202 App Div 240, 196 NYS 115, cited by the plaintiff, is not in point. Other facts to which plaintiff calls attention, such as that the defendant has no permit from any governmental authority to dredge sand in the lagoon; that it has enlarged the area of the lagoon and diminished that of the land; that it charges owners of log rafts for the privilege of parking them in the lagoon; and has erected therein piling and structures which may constitute obstructions to navigation, we believe to be irrelevant.

We are brought thus to the question of the application to this case of the Longshoremen's and Harbor Workers' Act of 1927. This is a question of federal law and the decisions of the Supreme Court of the United States are, of course, controlling.

Ten years before the Longshoremen's and Harbor Workers' Act was passed the Supreme Court reversed a judgment of the New York Court of Appeals which sustained an award of compensation under the New York Compensation Law to the widow and children of one Jensen, who was accidentally killed while working as a stevedore unloading cargo from a vessel berthed in the North River, navigable waters of the United States. Southern Pacific Co. v. Jensen, 244 US 205, 37 S Ct 524, 61 L ed 1086, LRS 1918C 451, Ann Cas 1917E 900 (1917). The reasoning of the court was as follows: Article III, §2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," and Article I, §8, con- [fol. 123] fers upon Congress the power "To make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Pursuant to this provision Congress enacted the Judiciary Act of 1789, which gives to the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Congress has the power to fix and determine maritime law throughout the country, and, in the absence of a controlling statute, general maritime law, as accepted by the federal courts, is applicable to matters within the maritime and admiralty jurisdiction. The work in which Jensen was engaged, his contract of employment, and his injuries were all maritime, and the rights and remedies of the parties were within the maritime jurisdiction. Further, since the remedy of the Compensation Act was wholly unknown to the common law, it was not saved to suitors from the grant of exclusive jurisdiction in the Judiciary Act. It was therefore concluded that the New York statute, as attempted to be applied, "works material prejudice to the characteristic

features of the general maritime law [and] interferes with the proper harmony and uniformity of that law in its international and interstate relations."

This was a five to four decision, Justices Holmes and Pitney wrote dissenting opinions, both of which were concurred in by Justices Brandeis and Clarke. There has been [fol. 124] considerable dissatisfaction with it both among commentators and in the Supreme Court itself, but it has never been overruled, and it was cited as recently as 1953 as controlling authority. Pennsylvania Railroad Co. v. O'Rourke, 344 US 334, 73 S Ct 302, 97 L ed 367.

Following the Jensen case Congress twice amended the Judiciary Act in endeavors to secure to maritime workers the benefits of state compensation laws.[1] Both amendments were held unconstitutional on the authority of the Jensen case. Knickerbocker Ice Co. v. Stewart, 253 US 149, 40 S Ct 438, 64 L ed 834, 11 ALR 1145 (1919); Washington v. W. C. Dawson & Co., 264 US 219, 44 S Ct 302, 68 L ed 646 (1924).

Against this background, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act. A great deal of litigation followed in which the question involved was whether, under the circumstances of the particular case, application of a state compensation law interfered "with the proper harmony and uniformity of" maritime law, the test laid down in the Jensen case. This history is reviewed in Davis v. Department of Labor, 317 US 249, 63 S Ct 225, 87 L ed 246. See, also, Nogueira v. N.Y., N.H. & H.R. Co., 281 US 128, 50 S Ct 303, 74 L ed 754; 2 Larson, Workmen's Compensation Law, pp 409-413; Gilmore and Black, The Law of Admiralty, pp 344-348. If the workman was injured in an employment considered to be "maritime but local," that is, only indirectly connected with [fol. 125] navigation and commerce, recovery under a state

[1] The Act of October 6, 1917, added to the savings clause of the Judiciary Act of 1789 the following: "and to claimants the rights and remedies under the workmen's compensation law of any State." The Act of June 10, 1922, amended this new matter so as to read "and to claimants for compensation for injuries to or death of persons *other than the master or member of the crew of a vessel* their rights and remedies under the workmen's compensation law of any State," etc. (Italics added.)

compensation law was permissible. The rule was thus summarized in Sultan Railway & Timber Co. v. Department of Labor and Industries, 277 US 135, 137, 48 S Ct 505, 72 L ed 820 (1928)

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. Grant Smith-Porter Co. v. Rohde, 257 U.S. 469; Millers' Indemnity Underwriters v. Braud, 270 U.S. 59; Alaska Packers Association v. Industrial Accident Commission, 276 U.S. 467."

Otherwise, the federal Act afforded the exclusive remedy, as provided in USC §903. In many instances the problem of where to draw the line was extremely difficult, and fine distinctions were indulged so that it became well-nigh impossible in some instances to predict on which side of the line a particular case would fall. Two of the decisions of this court during this period are illustrative. In Mark v. Portland Gravel Co., 130 Or 11, 278 P 986 (1929), the plaintiff was injured while working as engineer upon a dredge in the Columbia River, scooping up sand from the bed of the river and loading it on barges alongside for purposes of sale. The "local concern" doctrine was applied, and the plaintiff's remedy held to be exclusively under the State Compensation Law. The court relied on Grant Smith-Porter Ship Co. v. Rohde, 257 US 469, 42 S Ct 157, 66 L ed 321, 25 ALR 1008 (1922), in which the Supreme Court of the United States held that an injury sustained by the plaintiff while working as a carpenter on an uncompleted vessel on the Willamette [fol. 126] River was compensable under the Oregon Compensation Law. In Martinson v. State Ind. Acc. Com., 154 Or 423, 60 P2d 972 (1936), the workman was, at the time of his injury, assisting in the loading of machinery on a barge moored to a wharf on the Willamette River at Por-

land. The barge, when loaded, was to be towed to Bonneville Dam on the Columbia River. This court held that the work in which the plaintiff was engaged was maritime in nature, under the rule that loading or unloading a vessel is not a matter of purely local concern (Northern Coal & Dock Co. v. Strand, 278 US 142, 49 S Ct 88, 73 L ed 232; Employers' Liability Assurance Corp. v. Cook, 281 US 233, 50 S Ct 308, 74 L ed 823), and that there could be no recovery under the State Compensation Law.

In 1941 the Supreme Court of the United States decided the case of Parker v. Motor Boat Sales, 314 US 244, 62 S Ct 221, 86 L ed 184. One Armistead was a janitor and handyman for a small store selling boats and maritime equipment. His work was almost entirely on land, but on the occasion in question he went out in a small motor boat on the James River, the boat capsized, and he was drowned. The boat was being operated by a fellow employee on a test run. Armistead's duty at the time was to keep a lookout for hidden objects in the muddy river. His widow was awarded compensation by the Deputy Commissioner under the authority of the Longshoremen's and Harbor Workers' Act, the District Court affirmed, the Circuit Court of Appeals reversed, and the Supreme Court reversed the Circuit Court of Appeals and restored the original award.

As stated by Professor Larson, op cit 413:

> [fol. 127] "This decision by the highest court appeared to scrap the 'local' exception to maritime employment, for the relation to navigation and commerce of a casual and unauthorized ride in a tiny outboard motor boat might seem to approach the vanishing point."

See, also, Western Boat Bldg. Co. v. O'Leary, 198 F2d 409, 414 (9th Cir 1952).

Davis v. Department of Labor, supra, however, decided in the following year, cast a different light on the matter, at least with respect to the application of state compensation laws to maritime injuries. The question there was upon the application of the compensation law of the state of Washington to the case of an injury resulting in death

sustained by Davis, a structural iron worker whose employer was engaged in dismantling an abandoned drawbridge which spanned the Snohomish River, a navigable stream in the state of Washington. Davis was on a barge to which steel from the bridge had been lowered for carriage to a place of storage a short distance away. He was engaged in cutting pieces of steel into proper lengths for loading, and fell or was knocked into the stream and drowned. The Washington commission denied compensation and its ruling was affirmed by the Supreme Court of the state on the authority of *Jensen* and other United States Supreme Court decisions.

Without overruling the *Jensen* case the Supreme Court, in an opinion by Mr. Justice Black, held that the decedent's widow could validly be compensated under the Washington law. The court, after reviewing the confusion in the decisions following in the wake of *Jensen* and the difficulties encountered by employer and employees upon whom pressed "the horns of the jurisdictional dilemma" said:

> [fol. 128] "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this federal act; but employees such as decedent here, occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." 317 US 253.

The court continued:

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.
>
> "Faced with this factual problem we must give great —indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with

broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U.S.C. §920, which provides that, in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra." 317 US 256-257.

In the *Davis* case the court did not have the benefit of findings of any agency, either federal or state. Indeed, four Washington state tribunals had rejected the claim. Nevertheless, the court, relying on the presumption in favor of constitutionality of the state statute, reversed the judgment of the Washington Supreme Court.

[fol. 129] The radical departure from precedent in this decision is indicated when it is borne in mind that, as the Supreme Court of Washington said in its opinion (12 Wash2d 349, 121 P2d 365), Davis was working as a stevedore on a vessel in navigable waters loading cargo, and the Supreme Court of the United States had "uniformly held that the 'loading and stowing the ship's cargo' in navigable waters is a 'maritime service,' and that claims for injury incident thereto are exclusively within admiralty jurisdiction" (citing Atlantic Transport Co. v. Imbrovek, 234 US 52, 34 S Ct 733, 58 L ed 1208, 51 LRA (ns) 1157; Southern Pacific Co. v. Jensen, supra; Nogueira v. N.Y., N.H. & H.R. Co., supra; Employers' Liability Assurance Corp. v. Cook, supra).

The scope and impact of the *Davis* decision became more apparent in the light of the decisions in two cases following it which originated in state courts. In Moores's Case, 323 Mass 162, 80 NE2d 478 (1948), the question was whether state compensation could validly be awarded to the claimant, who was injured while engaged in repair

work on a floating dry dock, though his ordinary work was on land. Previously the Supreme Judicial Court of Massachusetts had held in O'Hara's Case, 248 Mass 31, 142 NE 844, in accordance with firmly established law, that the rights and liabilities of parties with respect to injuries received by workmen engaged in repair of a vessel lying in navigable waters (as distinguished from construction work on an uncompleted vessel) are governed by maritime law (Baizley Iron Works v. Span, 281 US 222, 50 S Ct 306, 74 L ed 819 (1930); 2 Larson, op cit §89.25), and that a [fol. 130] dry dock, designed to receive vessels floating in navigable waters is itself part of the navigable waters and subject to admiralty jurisdiction. The Steamship Jefferson, 215 US 130, 30 S Ct 54, 54 L ed 125; The Robert W. Parsons, 191 US 17, 24 S Ct 8, 48 L ed 73. But, in view of the *Davis* decision, the Massachusetts court felt bound "to include within the 'twilight zone' the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs," and held that the injury was compensable under the State Compensation Law. The judgment was affirmed by the Supreme Court of the United States without opinion on the authority of the *Davis* case, sub nom. Bethlehem Steel Co. v. Moores, 335 US 874, 68 S Ct 233, 93 L ed 417 (1948).

The other state case referred to was Baskin v. Industrial Accident Commission, 89 Cal App2d 632, 201 P2d 549 (1949). There the claimant's employer was engaged in repairing a vessel tied up at a wharf in San Francisco Bay. Claimant's work was almost entirely on land, but he was sent aboard the ship to perform a service in connection with the repair job and was injured. Compensation under the state law was denied, although the *Davis* case was considered by the court. Certiorari was allowed by the Supreme Court of the United States, which vacated the judgment in a per curiam decision and remanded the cause to the District Court of Appeals for reconsideration in the light of the *Moores* and *Davis* cases. 338 US 854, 70 S Ct 99, 94 L ed 523 (1949). On remand the California court reversed its former ruling (97 Cal App2d 257, 217

P2d 733 (1950)), certiorari was again granted, and the Supreme Court, in a memorandum decision, affirmed the [fol. 131] judgment on motion (340 US 886, 71 S Ct 208, 95 L ed 643).

Chief Justice Qua, who wrote the opinion for the court in *Moores's Case*, described the "twilight zone" as "an area of doubt within which the two acts overlap and the injured workman may recover under either of them." He found support for that view in the concurring opinion of Mr. Justice Frankfurter in the *Davis* case, who said "Theoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the federal act * * * or under a state statute." 217 US 259. Chief Justice Stone, who dissented in the *Davis* case because he thought that the decision was not "within judicial competence" (317 US 260), said: "Congress by the enactment of the Longshoremen's and Harbor Workers' Act has left no room for an overlapping dual system of the sort which the Court now espouses by placing its decision on a new doctrine that recovery under either the state or the federal act is to be sustained if the case is thought a close one." 317 US 261. Circuit Judge Hutcheson in De Bardeleben Coal Corp. v. Henderson, 142 F2d 481 (5th Cir 1944), referred to "the first come first served" rule of the *Davis* case. Professor Larson says "given a borderline case, and given a presumption of coverage, it follows that all borderline cases are resolved in favor of coverage by the first act under which application is made by the claimant." Larson, op cit 414. This diagnosis, however, seems to be at odds with two United States Court of Appeals decisions which held that, notwithstanding a prior award of compensation by a state tribunal, an award under the federal Act should be sustained, payments there- [fol. 132] tofore made to the workmen pursuant to the state law being credited upon the award made by the Deputy Commissioner. Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F2d 968 (4th Cir 1951); Western Boat Bldg. Co. v. O'Leary, supra.

We need not pursue this line of inquiry further. It is pertinent only insofar as it may throw light on one of

the questions in this case, namely, does the "twilight zone" doctrine apply where the injured workman is not seeking redress under any compensation statute but through the medium of an action at law? We think that it does not.

In enacting the Longshoremen's and Harbor Workers' Compensation Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter." Continental Casualty Co. v. Lawson, 64 F2d 802, 805 (5th Cir 1933), quoted in the De Bardeleben Coal Corp. v. Henderson, supra; Travelers Ins. Co. v. McManigal, 139 F2d 949 (4th Cir 1944). The preoccupation of Congress was with the compensation of injured workmen regardless of fault. As Chief Justice Hughes said in the Nogueira case, 281 US 136:

> "When the bill which became the Longshoremen's and Harbor Workers' Compensation Act was pending in Congress, the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer, were distinctly recognized."

See to the same effect Davis v. Department of Labor, supra, 317 US 254; Norton v. Warner Co., 321 US 565, 570, 64 S Ct 747, 88 L ed 931. Damage actions were not the concern of Congress save in the single instance of the failure of [fol. 133] an employer to secure payment of compensation as required by §905 of the Act, in which case, as previously stated, the injured workman or his legal representative, if death resulted from the injury, may elect to claim compensation or to maintain an action at law or in admiralty for damages.

In our view, the "twilight zone" was a contrivance—a "quasi-legislative decision," Judge Hutcheson called it in the *DeBardeleben* case—for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law. See Gilmore and Black, op cit §6-52; 2 Larson, Workmen's Compensation Law, §89.24. It was not recognized in

Pennsylvania Railroad Co. v. O'Rourke, supra, which held that a railroad brakeman, injured when unloading box cars from a car float on navigable waters, could not maintain an action under the Federal Employers' Liability Act, but that his sole remedy was under the Longshoremen's and Harbor Workers' Act. See 344 US 341, footnote 8.

Of the numerous reported decisions which have followed the *Davis* case we have been referred to none where the doctrine was invoked to include a choice between an action for damages under state law and federal compensation except Chappell v. C. D. Johnson Lumber Corp., 112 F Supp 625 (D Oregon 1953), where the identical issue was presented, and the court held that, whether the plaintiff was in an exclusive federal area or within the "twilight zone," since he was not covered under the Oregon Compensation Law he could not maintain a common-law action [fol. 134] and his sole remedy was under the Longshoremen's and Harbor Workers' Act. "The Act," the court said, "is automatic except in the limited circumstances provided for in the act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act." The judgment in this case was reversed by the United States Court of Appeals, but on another point. 216 F2d 873 (9th Cir 1954).

See, also, Scrinko v. Reading Co., 117 F Supp 603, 608. (D NJ 1954).

Based on a suggestion in a scholarly law review article,[2] it is urged by counsel for the plaintiff that, since the Oregon Workmen's Compensation Act provides for an action against an employer who elects not to come under the Act in which the common-law defenses are not available to the defendant, the Act "would apply in toto." That is to say, that in a case such as this where the employer is not under the Act, the provision for an action at law would operate as a substitute for the compensation pro-

[2] "Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone" by Robert E. Rodes, Jr., 68 Harv. L. Rev. 637.

vision of the Act. We are not persuaded that such a course would accord with the intent of Congress. Nor do we find anything in the *Davis* case which supports it. Rather, we think that we should take for granted that the *Davis* opinion was intended to be limited to the kind of facts it dealt with and to the class of cases out of which emerged the "jurisdictional dilemma," which it was hoped would be dissipated and vanish in the "twilight zone." If, perhaps, a logical argument could be made for the suggestion, nevertheless, like Chief Justice Qua, we "recognize the futility of [fol. 135] attempting to reason logically about 'illogic'" (Moores's Case, 323 Mass 167), and will not further attempt to illuminate so dark a subject.

We think this a case to which the Longshoremen's and Harbor Workers' Act clearly applies, and that compensation under it is the plaintiff's sole remedy for his injury. He will not have lost this right through delay because, under §913 (a), (d), the one year's time allowed for filing a claim will not begin to run until the termination of this action.

In Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, supra, where the court sustained an award under the federal Act for an injury to a welder engaged in the repair of a graving dry dock, Circuit Judge Soper, writing the opinion for the court, said with reference to the decision of that court in Travelers Ins. Co. v. McManigal, 139 F2d 949 (4th Cir 1944):

> "* * * In that case we reviewed the decisions in border line cases of a maritime nature and endeavored to show the tendency of the courts, acting in the interest of humanity prior to the passage of the Longshoremen's Act, to enlarge the jurisdiction of state compensation commissions by developing the 'local concern' doctrine so as to enable state commissions to make awards to injured men, and the opposite tendency, since the passage of the federal statute, to adhere more strictly to the traditional principle that admiralty jurisdiction depends upon the location of the activities involved upon navigable waters * * *."

Among the cases exemplifying the more recent tendency we call particular attention to Radcliff Gravel Co. v. Henderson, 138 F2d 549 (5th Cir 1943). The employer in that case was engaged in the same business as the defendant here, namely, the dredging of sand and gravel from the [fol. 136] bed of a navigable lake. The case involved the death by drowning of two employees. Their job was trimming the sand and gravel as it was loaded onto barges to keep it from "forming a pyramid or being cone-shaped." The contract of employment provided that the employer was to furnish transportation to and from the shore and dredge boat. Several employees were drowned when a small boat, propelled by an outboard motor, in which they were being transported by their employer, capsized. Awards under the federal Act to the dependents of two of them were sustained, and this without reference to the *Davis* case or the "twilight zone." The case here is even stronger, for, at the time of his injury, the plaintiff was engaged in loading a barge. "A barge is a vessel within the meaning of the Act even when it has no motive power of its own." Norton v. Warner Co., supra, 321 US 571; Martinson v. State Ind. Acc. Com., supra. The loading of a vessel has a direct relation to commerce and navigation and is not a matter of purely local concern. Martinson v. State Ind. Acc. Com., supra; Pennsylvania Railroad Co. v. O'Rourke, supra; Employers' Liability Assurance Corp. v. Cook, supra; Northern Coal & Dock Co. v. Strand, supra. If it should be said that, notwithstanding the survival of *Jensen* (see the *O'Rourke* case, 344 US 337), decisions rendered during the "maritime but local" era are suspect, it nevertheless remains clear that under the *O'Rourke* and *Motor Boat Sales* decisions the present case comes directly under the terms of the federal Act. Section 903 provides for payment of compensation "if the disability or death results from an injury occurring upon the navigable waters of the United States," and §904 defines the [fol. 137] employer, who is made liable for the compensation, as "an employer any of whose employees are employed in maritime employments, in whole or in part, upon

the navigable waters of the United States (including any dry dock)."

The nature of the plaintiff's regular work, the fact, if it were such, that it was not maritime, is not controlling. "The statute applies," said the court in the *O'Rourke* case, "by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service." 344 US 339. Again, "Section 902 (4) requires the employer to pay compensation if he has 'any' employees so engaged. If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime.'" 344 US 341-342. The court said further, "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable waters." 344 US 337. In short (absent, at least, a choice between the federal and a state compensation law), the federal Act adopts the familiar rule that in tort cases the admiralty jurisdiction depends upon the locality of the injury. The Admiral Peoples, 295 US 649, 55 S Ct 885, 79 L ed 1633 (1935); O'Hara's Case, 248 Mass 31, 142 NE 844 (1924); Ford v. Parker, 52 F Supp 98 (D Md 1943). Cf. State Industrial Commission v. Nordenholt, 259 US 263, 42 S Ct 473, 66 L ed 933, 25 ALR 1013 (1922).

The following cases tend to support the conclusion at which we have arrived: Avondale Marine Ways v. Henderson, 346 US 366, 74 S Ct 100, 98 L ed 77 (1953); Green v. Simpson & Brown Construction Co., 14 NJ 66, 101 [fol. 138] A2d 10 (1953); Standard Dredging Corporation v. Henderson, 150 F2d 78 (5th Cir 1945); De Bardeleben Coal Corp. v. Henderson, supra; Ford v. Parker, supra; Travelers Ins. Co. v. McManigal, supra.

We think that the judgment below was right and it is affirmed.

[fol. 139]

IN THE SUPREME COURT OF THE STATE OF OREGON

William C. Perry, Chief Justice, George Rossman, Associate Justice, Hall S. Lusk, Associate Justice, James T. Brand, Associate Justice, Harold J. Warner, Associate Justice, Wm. M. McAllister, Associate Justice, Randall B. Kester, Associate Justice, F. M. Serombe, Clerk.

#225-544

Appeal from Multnomah County

HARRY A. HAHN, Appeliant,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Respondent.

—JUDGMENT—January 22, 1958

This cause on November 20, 1957, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

It Is Therefore Considered, Ordered and Adjudged that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

The appellant having given an undertaking on appeal with Marie Erkenbeck as his surety conditioned that said appellant will pay all damages, costs and disbursements on appeal that may be taxed against appellant.

It Is Therefore Ordered that respondent have and recover of and from appellant and his surety its costs and disbursements in this court taxed at $192.00.

It Is Further Ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.

[fol. 140]

IN THE SUPREME COURT OF THE STATE OF OREGON

[Title omitted]

Honorable James R. Bain, Judge.

APPELLANT'S PETITION FOR REHEARING

Comes now Appellant and moves the court for a rehearing in the above-entitled cause and alleges the court committed manifest error in the written opinion in this case in the following particulars:

I

In determining it is constitutional to apply State Workmen's Compensation Laws but not an Employer's Liability Act.

II

In determining that employers may ex parte decide the constitutional question.

[fol. 141]

III

In determining that Congress intended to confine the application of State law to Workmen's Compensation Acts.

IV

In determining that the U. S. Supreme Court intended to confine the application of State law to Workmen's Compensation Acts.

V

In failing to give effect to the presumption of constitutionality of a State Act.

Appellant respectfully requests that if the foregoing specifications of error, or any of them, are found to be well taken and a rehearing granted, the court grant time for oral argument.

Wherefore, Appellant prays that a rehearing be granted.

Respectfully submitted,

Dwight L. Schwab, Hutchinson, Schwab & Burdick
Attorneys for Appellant.

[fol. 142]

IN THE SUPREME COURT OF THE STATE OF OREGON

Appeal from Multnomah County

HARRY A. HAHN, Appellant,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Respondent.

ORDER DENYING PETITION FOR REHEARING—
February 18, 1958

The court having duly considered the petition of appellant for a rehearing in the above-entitled matter and the court being fully advised thereon,

It Is Hereby Ordered that said petition be and the same is hereby denied.

[fol. 144] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 145]

SUPREME COURT OF THE UNITED STATES

No. 938—October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—June 2, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of Oregon is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. [redacted] 52

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1957

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on January 22, 1958, with a denial of petition for rehearing on February 18, 1958.

CITATIONS TO OPINIONS BELOW

The only written opinion, that of the Supreme Court of the State of Oregon (R 19-40) is printed in Appendix B hereto, infra, p 27, and is reported in 66 Or. Adv. Sh. 117, 320 P2d 668.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered January 22, 1958 (R 41; App B, infra, 49). Rehearing was denied on February 18, 1958 (R 44). The jurisdiction of this Court is invoked under 28 USC, Section 1257(3).

The question for review was first raised in the trial court in paragraph IV of respondent's further and affirmative defense as follows:

> "That the sole and exclusive liability of the defendant for any injuries for which the plaintiff may have incurred as alleged in plaintiff's second amended complaint is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act." (R 8½.)

The opinion of the Oregon Supreme Court states:

> "The action of the trial court was based upon the view that plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 USC, Title 33, §§901 et seq.). This ruling presents the only question on this appeal." (R 20; App. B 27.)

And later in its opinion the court states:

> "We are brought thus to the question of the application to this case of the Longshoremen's and Harbor Workers' Act of 1927. This is a question of federal law and the decisions of the Supreme Court of the United States are, of course, controlling." (R 24; App. B 32.)

QUESTION PRESENTED

1. An employer, *ex parte*, rejects a state workman's compensation act;

2. His "twilight zone" employee is injured through the employer's negligence;

3. The employee would be entitled to state compensation benefits but for the employer's rejection;

4. The compensation act grants such employee another remedy against the employer;

Is the employee prevented by the U. S. Constitution and the Longshoremen's Act from exercising such substitute remedy?

The Oregon Supreme Court says: "Yes, such injured employee has no state remedy whatsoever."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are:

(a) U. S. Constitution:

Art III, Sec 2, cl 1
Art I, Sec 8, cl 18

(b) Federal Statutes:

Longshoremen's and Harbor Workers' Compensation Act
33 USC 903
33 USC 905

(c) Oregon Statutes:

Workmen's Compensation Act
ORS 656.006
ORS 656.022
ORS 656.024
ORS 656.084(2)
ORS 656.152

Employers' Liability Act
ORS 654.305 to ORS 654.335

They are printed in Appendix A, infra, 19-26.

STATEMENT

1. Procedural History and Federal Question Presented

Petitioner, injured March 23, 1955 while employed by respondent, filed this action pursuant to the Oregon Employer's Liability Act in the Circuit Court of the State of Oregon for the County of Multnomah (App B, 27). Prior to petitioner's employment, respondent had rejected the Oregon Workmen's Compensation Act (App B, 29). Respondent pleaded by answer that the Longshoremen's and Harbor Workers' Compensation Act was petitioner's exclusive remedy (R 8½). Upon trial, a verdict was returned for petitioner on February 10, 1956, in the sum of $38,242, and judgment was entered in that amount, plus costs (R 15). Thereafter, on respondent's motion, the trial court set aside the judgment for petitioner on the sole ground that the Longshoremen's Act was petitioner's exclusive remedy, and entered judgment for respondent (R 17; App B, 27).

Petitioner appealed to the Oregon Supreme Court, which on January 22, 1958, affirmed on the sole ground

that the Longshoremen's Act was petitioner's exclusive remedy (App. B 45-46). Thereafter, on February 18, 1958, the Oregon Supreme Court denied petitioner's petition for rehearing without opinion (R 44). Petitioner has no further remedy for appellate review in the state courts of Oregon.

2. Facts Material to the Question Presented

Respondent has been in the business of commercially dredging sand and gravel for sale for many years. The product comes from the center (lagoon) of Ross Island, which island is located in the navigable Willamette River, State of Oregon (Tr 7). The land portion of Ross Island is shaped like a horseshoe. At the north end there is a single opening allowing the river to come in and form a lagoon (Tr 18; See Ex 4, Tr 16). Respondent owns all of Ross Island (including the east part which is sometimes called Hardtack Island), including all the land under the lagoon. The entire area owned by respondent is enclosed in red pencil on Exhibit 1 (Tr 7).

Respondent dredges sand and gravel from the bottom of the lagoon and digs away at the sides (Tr 7), loading the product on barges, which are towed a short distance to respondent's rock crusher, also in the lagoon (Tr 89; Ex 4, Tr 16 and Ex 10, Tr 33). There a conveyor belt conveys all the sand and gravel to shore for sale (Tr 125, 126).

Respondent operates the lagoon as it pleases, having driven piling and cement piers throughout (Tr 21, 22, 113, 123-125; Ex 1), built and maintains a large tower

in the center of the only entrance to the lagoon (Tr 125, 126; Exs 1 and 10), and rents space therein for parking, breaking up and sorting log rafts and booms, blocking off large portions of the lagoon (Tr 113-120, 130; Ex 4); respondent would eject anyone from the lagoon who desires to stay there without paying respondent's rental rates (Tr 129-132). The U. S. Government has drawn harbor lines around the entire property, excluding the lagoon (Tr 96, Ex C, R 18). A comparison of Exhibit D (map of Ross Island in 1895; Tr 96, 97, R 18) and Exhibit 4 (recent photo) shows how respondent has completely altered the island and lagoon. Respondent dredges without permit from any governmental authority and pays no royalties (Tr 7).

Petitioner's regular employment with respondent was as an oiler on a dredge anchored to the shore (Tr 21). Here sand and gravel was dredged from the bottom of the lagoon. The place he worked is shown with a small inked "x" on Exhibit 4 (Tr 43, 44). All his work was in the lagoon (Tr 18).

March 23, 1955, petitioner did his regular dredge work for several hours (Tr 29); he was then ordered to the rock crusher (see small inked "o" on Ex 4 for location in lagoon) to do cleanup work (Tr 29, 30). Two of respondent's barges were next to the rock crusher in the lagoon. Respondent was transferring a gravel hopper or bin (used to load trucks with gravel on land, Tr 31) owned by respondent (Tr 122, 123), from one barge to the other (Tr 31). (See the "o" on Ex 4 for location of barges, Tr 44). After a land based crane

(Tr 31) had lifted the hopper from one barge and put it on the other, petitioner was ordered to go up a ladder on the hopper to loosen the crane cable (Tr 34, 35). Due to respondent's negligent disregard of established safety rules for ladders (App B, 28), the ladder broke loose as petitioner got to the top (Tr 44), and he was seriously and permanently injured (App B, 28). The hopper was to be barged across the Columbia River a short distance to Cathlamet, Washington, for use by respondent in connection with its sale of sand and gravel, it having been brought into the lagoon by another barge from another nearby road job of respondent in Oregon (Tr 120).

The Oregon Workmen's Compensation Act is contained in ORS 656.002 through 656.590. Pertinent provisions are referred to in the next few paragraphs and are printed in Appendix A, infra, 19-26.

Petitioner and respondent were subject to the Compensation Act at the time of injury. The Act provides such a sand and gravel operation is under the Act (ORS 656.084(2), App A, 22).

Injured workmen covered by the Act may only receive specified sums from the State Industrial Accident Fund, and such payments are in lieu of all other claims against the employer (ORS 656.152, App A, 23).

However, petitioner was not covered by such payments under the Compensation Act because, pursuant to ORS 656.022 (App A, 21) (part of the Act), re-

spondent had, *ex parte*, rejected the Act (Tr 97; App B, 29).

ORS 656.024 (also part of the Compensation Act) provides that a rejecting employer is entitled to none of the benefits of the Act, and is liable in an action by an employee for injuries occasioned by the employer's negligence, default or wrongful act as if the Act had not been passed; and removes certain defenses (App A, 22).

ORS 656.006 (App A, 21) (also part of the Compensation Act) provides that where an employee is authorized under the Compensation Act to bring an action against his employer (see paragraph above), his action may, in applicable situations, be brought pursuant to the Oregon Employer's Liability Act (ORS 654.305 through 654.335; App A, 23-26). It was pursuant to this provision of the Workmen's Compensation Act (ORS 656.006) that petitioner brought this action.

Respondent had private insurance coverage for its liability under the Oregon Workmen's Compensation Act as rejected (ORS 656.024) and under the Oregon Employer's Liability Act (ORS 656.006; 654.305-654.335) (Tr 97).

REASONS FOR GRANTING THE WRIT

The Oregon Supreme Court, while apparently tacitly agreeing (or at least not denying) that this case falls within the "twilight zone," held that petitioner could not recover under Oregon law because the recovery did not consist of workmen's compensation benefits as such

—but rather was under the Employer's Liability Act based on negligence. In other words, the Oregon Supreme Court strictly confined state recovery in the "twilight zone" solely to workmen's compensation payments —even though the Compensation Act itself provided for the remedy sought against a rejecting employer.

Obviously, it is important to petitioner that he be allowed redress under the laws of his own state. But this importance is not confined to petitioner. There are millions of workers in the United States not covered by any workmen's compensation act. Many thousands, perhaps millions, of these people from time to time find themselves on the water or waterfront — on a boat or barge—in a "twilight zone" situation, as did petitioner. This includes persons in all walks of life — carpenters, ship fitters, electricians, delivery men, plumbers, dredge operators, mechanics, helpers, truck drivers, and a host of others. Are all these people to be denied access to the local forum?

The importance of this is pointed up by Bulletin 161 (Revised), State Workmen's Compensation Laws, published by the U. S. Department of Labor, August 1957. At page 2, the following appears:

> "There are great variations in the provisions of the different [compensation] laws. They vary as to type of law, coverage, amounts of benefits paid, insurance requirements, and administrative procedures. Because of coverage limitations, and the fact that about half the laws are elective rather than compulsory, many thousands of workers are still unprotected by these laws. Estimates of the number of workers covered under the State and Federal

programs vary. A recent estimate published in the Social Security Bulletin of the Health, Education, and Welfare Department states that in an average week of 1955, 39-40 million workers had protection under the State and Federal workmen's compensation programs. A few years before, the Chamber of Commerce had placed the number at 45 million, and the President's Commission on the Health Needs of the Nation at 35 million.

"These estimates indicate that at most not more than 75 percent of the workers in this country are covered, and the number may be less than 60 percent. This leaves 25 to 40 percent of the total workers without protection under workmen's compensation for injuries suffered on the job. Many of these unprotected workers are included in the 2 million persons each year who suffer occupational injuries and deaths. The yearly average for such injuries and death for the 7 years 1946 to 1952, inclusive, was 17,529 killed or totally disabled for life, 86,243 partially disabled for life, and 1,911,800 more temporarily disabled — a yearly average total of 2,015,557 injuries and deaths."

At page 3, the following appears:

"An elective act is one in which the employer has the option of of [sic] either accepting or rejecting the act, but in case he rejects it he loses the customary common law defenses—assumed risk of the employment, negligence of fellow servants, and contributory negligence. Although most employers elect to come under the act, some do not. In the latter case the employees may be unable to obtain compensation unless they sue for damages.
* * * *

"Twenty-nine of the workmen's compensation acts are compulsory and 25 are elective for most of the employments covered."

Obviously, through no fault of their own, many thousands, perhaps millions, of uncovered persons from all over the country are apt, at some time, or often, to be in "twilight zone" situations.

These uncovered workers should not be in the position of petitioner who was seriously and permanently injured over three years ago. To date he has not received one cent in redress, damages or compensation. Because he wants to proceed under his own state law, he is being forced to come to this Court merely to establish his right to maintain an action against his negligent employer who voluntarily and *ex parte* prevented petitioner from obtaining payments under the state workmen's compensation act. The question whether these uncovered workers may seek redress pursuant to appropriate state law is of extreme importance and should be settled.

Under the facts as stated supra (5-7), and as stated by the Oregon Supreme Court (App B, 27, 28, 30-32), there can be no question that this is a "twilight zone" situation. Factually, it is as strong, or stronger, for state jurisdiction than the facts in the cases of Davis v. Department of Labor & Industries, 317 US 249, 63 S Ct 225, 87 L ed 246; Moores' Case (sub nom Bethlehem Steel Co. v. Moores), 335 US 874, 69 S Ct 233, 93 L ed 417 (323 Mass 462, 80 NE2d 478); or Baskin v. Industrial Accident Commission, 338 US 854, 70 S Ct 99, 94 L ed 523 (89 Cal App2d 632, 201 P2d 549); (sub nom Kaiser Co. v. Baskin), 340 US 886, 71 S Ct 208, 95 L ed 643 (97 Cal App2d 257, 217 P2d 733).

The Oregon Court stated:

> "In enacting the Longshoremen's and Harbor Workers' Compensation Act 'Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter.'" (App B, 43.)

This is most doubtful. The Act was a direct result of the decision in Southern Pacific Company v. Jensen, 244 US 205, 37 S Ct 524, 61 L ed 1086. Twice Congress tried to undo the *Jensen* decision, but this Court struck down the efforts. The very wording of 33 USC § 903(a), (App A, 19-20), shows that Congress wanted to give to the states everything this Court would allow (*Davis* case 317 US at 252, 253). The statute was the reluctant act of Congress attempting merely to fill a void created by the *Jensen* decision, where this Court prevented a state remedy.

Nor does the reference to "workmen's compensation" in 33 USC § 903(a) confine an injured workman to workmen's compensation provisions of state statutes. As pointed out in U. S. Casualty Co. v. Taylor (CCA 4), 64 F2d 521, 524; cert. den. 290 US 639, 78 L ed 555:

> "The phrase 'may not validly be provided by State law' obviously refers to the authority of the state to act and not to the inquiry as to whether a state has exercised its power."
>
> (See also *Motor Boat Sales v. Parker* (4 CCA), 116 F2d 789, 793; reversed on other grounds, 314 US 244.)

In fact, when the Longshoremen's Act was passed, five states (N.C., S.C., Miss., Fla. and Ark.) did not even have a workmen's compensation act.

The remedy petitioner seeks is essentially the same as Congress provided when it enacted 33 USC § 905 of the Longshoremen's Act (App A, 20); i.e., a workman injured by fault of his employer may sue the employer for damages with certain defenses removed, where the employer fails to secure payment of compensation as required under the Longshoremen's Act. In other words, as to non-complying employers, the result is the same whether under state or federal law.

After years of agonizing hairsplitting on what was maritime employment, this Court in the Parker v. Motor Boat Sales, Inc., 314 US 244, 62 S Ct 221, 86 L ed 184, and *Davis* (317 US 249) cases set up a "twilight zone" area where the injured workman could choose his forum as between federal and state law. By means of presumptions, this Court made it clear it would sustain the workman in his choice of remedy (a recent case, Richard v. Lake Charles Stevedores (La) 95 So(2) 830, 831, cert. den. by this Court March 3, 1958, referred to this as "concurrent jurisdiction"). - - - If the workman chose a state remedy, he would be sustained by the presumption of constitutionality of the state law. The presumption of constitutionality applies to any state law under consideration (*Davis* case, 317 US at 257, 258)—thus, it is *presumed* that the application of the Oregon Employer's Liability Act is constitutional. The Oregon Supreme Court failed to consider or discuss the presumption of constitutionality.

The Constitution of the United States permits the application of one of 48 different compensation laws in such situations, and compensation laws do vary greatly

(See Bulletin 161, supra, p 9). The only uniformity in the various Acts is in their consistent non-uniformity. Thus, there can be no sound reason for drawing the line against the same application of closely related state laws. Particularly is this true where the compensation law in question specifically provides for such a remedy by the workman if the employer rejects the compensation act.

The Oregon Supreme Court obviously does not like the *Davis, Baskin* and *Moores* solution:

> "In our view, the 'twilight zone' was a contrivance—a 'quasi-legislative decision', Judge Hutcheson called it in the *De Bardeleben* case — for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law." (App. B, 43, 44.)

Be that as it may, this Court recognized the unfortunate results of the *Jensen* decision, the appalling hardship to injured workmen, and rendered a practical solution.

If this Court allows the Oregon Supreme Court's restricted interpretation of the *Davis* case to stand, thousands of uncovered workers will be vitally affected by this decision, which will be cited wherever the question arises—and this court will again find itself faced with the task of splitting hairs.

But perhaps more basic yet is the anomaly of allowing employers in the 25 elective states to, *ex parte*, make a constitutional determination. That is, if the employer alone decides it is best for him to comply with the state act, his workmen may recover under state law. On the

other hand, if the employer decides it is to his advantage to reject the act, his workmen are constitutionally forbidden to recover under state law. There are few employers who merit this power of constitutional decision.

The obvious purpose of ORS 656.024 and 656.006 (App A, 21, 22) is to actively encourage employers to comply with the compensation act. The same provisions generally appear in all elective Acts (See Bulletin 161, supra, 10). That was clearly the purpose of Congress in putting the last portion of 33 USC 905 (App A, 20) into the Longshoremen's Act. - - The restrictive decision of the Oregon Supreme Court will, to the contrary, actively encourage employers all over the United States to reject elective compensation acts, and thus effectively prevent their employees from recovering under state law. Whereas, if the Oregon Supreme Court is reversed, the opposite will result. Employers, knowing that they will be subject to actions pursuant to provisions such as ORS 656.024 and ORS 656.006 will be considerably less willing and eager to peremptorily reject the Act, as did respondent. Employers should not be allowed to use the U. S. Constitution as a device to thwart the humanitarian purposes of the workmen's compensation acts (See 68 Harvard Law Review 637, 647, 648).

The Oregon Supreme Court, in arriving at its decision, places heavy reliance on the case of Penn. Railroad Co. v. O'Rourke, 344 US 334, 73 S Ct 302, 97 L ed 367 (App B, 44, 47, 48). True, there is a superficial similarity between *O'Rourke* and the case at hand in that one involves the Federal Employer's Liability Act and this

case involves the Oregon Employer's Liability Act. But there the similarity ends. This court clearly stated in footnote 8 (334 US at 341) of the *O'Rourke* decision that no constitutional question was involved; only the interpretation of two federal statutes. This Court should clear up this complete misapplication of the *O'Rourke* doctrine by the Oregon Supreme Court.

It appears wholly illogical to say that the states can constitutionally apply compensation laws, but not other closely related, or substitute, laws. Workmen's compensation laws have a humane purpose — liability without fault. But there can be nothing unconstitutional in allowing a further remedy where there is a grave fault as there was in this case—and particularly when the employer is solely responsible for the failure of the compensation provisions of the law to apply — *and the compensation law* itself provides for that further remedy.

The U. S. Constitution is a broad document, susceptible to intelligent and reasonable interpretation. It is nonsensical and unreasonable to leave any injured workman remediless in his own state only because his employer rejected the Act. The only reasonable interpretation that can be given is—in the "twilight zone" the states may constitutionally apply their workmen's compensation acts, *and* other laws which are supplemental thereto in the event the employer has failed or refused to provide workmen's compensation coverage. Such is only consonant with the Acts themselves. Petitioner, as well as the thousands of other uncovered "twilight zone" employees throughout the country, is entitled to such a reasonable interpretation of the U. S. Constitution.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

U. S. CONSTITUTION

ARTICLE III — Section 2, Clause 1:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or, which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

ARTICLE 1 — Section 8, Clause 18:

"The Congress shall have Power * * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

FEDERAL STATUTES

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT:

33 USC 903:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and

if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

33 USC 905:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

OREGON STATUTES:

WORKMEN'S COMPENSATION ACT (ORS 656.002 to 656.590) PERTINENT SECTIONS:

ORS 656.006 EFFECT ON EMPLOYER'S LIABILITY LAW. ORS 656.002 to 656.590 do not abrogate the rights of the employe under the present employers' liability law, in all cases where the employe, under ORS 656.002 to 656.590 is given the right to bring suit against his employer for an injury.

ORS 656.022 EMPLOYER'S ENGAGED IN HAZARDOUS OCCUPATIONS AS SUBJECT TO WORKMEN'S COMPENSATION LAW. (1) All persons engaged as employers in any of the hazardous occupations specified in ORS 656.082 to 656.086 shall be subject to ORS 656.002 to 656.590; provided, that any such employer may be relieved of certain of the obligations imposed by those statutes and shall lose the benefits conferred by those statutes by filing with the commission written notice of an election not to be subject thereto in any manner specified in those statutes.

(2) Where an employer is engaged in a hazardous occupation, as defined in ORS 656.082 to 656.086, and is also engaged in another separate occupation or other separate occupations not so defined as hazardous, he shall not be subject to ORS 656.002 to 656.590 as to the separate nonhazardous occupations, nor shall his workmen wholly engaged in such separate nonhazardous occupations be subject thereto except by an election as authorized by ORS 656.034.

(3) Employers who are engaged in an occupation partly hazardous and partly nonhazardous come under ORS 656.002 to 656.590 as if the occupation were wholly hazardous.

(4) It is the purpose of this section that an occupation and all work incidental thereto and all workmen engaged therein shall be wholly subject to or wholly outside the provisions of ORS 656.002 to 656.590.

ORS 656.024 ELECTION OF EMPLOYER ENGAGED IN HAZARDOUS OCCUPATION NOT TO CONTRIBUTE; LIABILITY OF EMPLOYER SO ELECTING. Before becoming engaged as an employer in any hazardous occupation defined by ORS 656.082 to 656.086, the employer may file with the commission a statement in writing declaring his election not to contribute to the Industrial Accident Fund, and thereupon shall be relieved from all obligations to contribute thereto. Such employer shall be entitled to none of the benefits of ORS 656.002 to 656.590 and shall be liable for injuries to or death of his workmen, which are occasioned by his negligence, default or wrongful act as if such statutes had not been passed. In any action brought against such an employer on account of an injury sustained by his workman, it shall be no defense for the employer to show that:

(1) The injury was caused in whole or in part by the negligence of a fellow-servant of the injured workman.

(2) The negligence of the injured workman, other than his wilful act committed for the purpose of sustaining the injury, contributed to the accident.

(3) The injured workman had knowledge of the danger or assumed the risk which resulted in his injury.

ORS 656.084 LIST OF HAZARDOUS OCCUPATIONS. The hazardous occupations to which ORS 656.002 to 656.590 are applicable are as follows: * * *

(2) The operation of gravel, sand or coal plants or bunkers; flour, feed or chop mills; creosoting or wood-treating works; garbage works; wood saws, stockyards, tanneries, grain elevators, rock crushers, briquet plants, ice plants, cold storage plants, canneries, milk condenseries, creameries, foundries, blast furnaces, mines, gas works, water works, reduction works, breweries, distilleries, wineries, wharves, docks, smelters, powder works or quarries.

ORS 656.152 WHAT ARE COMPENSABLE INJURIES; RIGHT TO COMPENSATION AS IN LIEU OF CLAIM AGAINST EMPLOYER. (1) Every workman subject to ORS 656.002 to 656.590 while employed by an employer subject to ORS 656.002 to 656.590 who, while so employed, sustains personal injury, or injury to prosthetic appliances by accident arising out of and in the course of his employment and resulting in his disability, or the beneficiaries of such workman, if the injury results in death, are entitled to receive from the Industrial Accident Fund the sums specified in ORS 656.002 to 656.590. The repair or replacement of prosthetic appliances so injured shall be provided subject to the approval of the commission.

(2) The right to receive such sums is in lieu of all claims against his employer on account of such injury or death, except as otherwise specifically provided in ORS 656.002 to 656.590.

EMPLOYERS' LIABILITY ACT:

ORS 654.305 PROTECTION AND SAFETY OF PERSONS IN HAZARDOUS EMPLOYMENT GENERALLY. Generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

ORS 654.310 PROTECTIVE MEASURES TO BE OBSERVED REGARDING CERTAIN MACHINES, EQUIPMENT AND DEVICES WHICH ARE DANGEROUS TO EMPLOYEES. All owners, contractors, sub-contractors or persons whatsoever, engaged in the construction, repairing,

alteration, removal or painting of any building, bridge, viaduct or other structure or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the em-

ployees of the owner, contractor or sub-contractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

ORS 654.315 PERSONS IN CHARGE OF WORK TO SEE THAT ORS 654.305 TO ORS 654.335 IS COMPLIED WITH. The owners, contractors, sub-contractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

ORS 654.320 WHO CONSIDERED AGENT OF OWNER. The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee.

ORS 654.325 WHO MAY PROSECUTE DAMAGE ACTION FOR DEATH; DAMAGES UNLIMITED. If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or sub-contractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

ORS 654.330 FELLOW SERVANT'S NEGLIGENCE AS DEFENSE. In all actions brought to recover from an employer for injuries suffered by an employee, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

ORS 654.335 CONTRIBUTORY NEGLIGENCE. The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

APPENDIX B

OPINION OF OREGON SUPREME COURT

LUSK, J.

This is a personal injury action under the Oregon Employers' Liability Act in which the court set aside a verdict for the plaintiff and entered judgment for the defendant notwithstanding the verdict. The plaintiff has appealed. The action of the trial court was based upon the view that plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 USC, Title 33, §§ 901 et seq.). This ruling presents the only question on this appeal.

The defendant is an Oregon corporation which operates a sand and gravel business on the Willamette River in Portland. It conducts dredging operations with the use of a dredge, barges and power-driven machinery in a portion of the river referred to in the testimony as a lagoon—a small bay or inlet roughly rectangular in shape, the entrance to which from the main body of the river is at the north. Otherwise, it is surrounded by land—Ross Island on the west, Hard Tack Island on the east, and a strip of land on the south connecting the two.

On the day that plaintiff was injured, March 23, 1955, and for some eight days prior thereto, he was employed by the defendant as an "oiler." His general duties were on a dredge anchored to the shore, which was used to scoop out sand and gravel from the bottom of the lagoon and dump it on a barge. He looked after the machinery

of the dredge and operated a winch to move the barge into position. If there was a breakdown in the machinery it was his duty to repair it. The barge, when filled, was moved to the crusher, which was located inside of the lagoon, and, after the gravel was crushed, it was carried by means of a conveyor belt to the defendant's plant on the right bank of the river. He was injured, however, while performing a different type of work. He was ordered to assist in transferring a large gravel bin or hopper, used for loading sand and gravel into trucks, from one barge to another. The hopper was so constructed that trucks could be driven under it to receive their loads. A power-driven crane on shore was employed to pick up the hopper and move it. After the hopper was moved and stowed it became the plaintiff's job to go to the top of the hopper by means of a ladder nailed to the hopper and loosen a cable used in the moving operation. He had climbed high enough to reach the top rung of the ladder with his hand when the ladder gave way, and he fell a distance of about eight or ten feet, landing on his back on hard-packed sand in the barge and receiving serious injuries. The ladder fell upon him. The evidence shows that the ladder, which was constructed of heavy timbers, was fastened to the hopper only by nails which had been driven into wood that was rotten. No bolts or chains were used to make it secure, although it was practicable to use them. There seems to be no question about the negligence of the defendant or its violation of the provisions of the Employers' Liability Act.

In 1927 Congress passed the Longshoremen's and

Harbor Workers' Compensation Act in order to provide compensation irrespective of fault for injury or death in the case of employees of employers "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." USC, Title 33, §902(4). Section 903(a) provides in part:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Liability of an employer as prescribed by the Act is made exclusive, but, if any employer fails to secure payment of compensation as required by the Act, an injured employee, or his legal representative in case death results from the injury, is given an election to claim compensation or to maintain an action at law or in admiralty for damages, in which case the defenses of negligence of a fellow servant, assumption of risk, and contributory negligence are not available to the employer. § 905.

The defendant had secured payment of compensation as required by the Federal Act, § 932, but had exercised its election not to be subject to the Workman's Compensation Law of this state (ORS 656.022).

It is contended first, on the part of the plaintiff, that the injury did not occur upon "navigable waters of the United States," but as to this we think that there can

be little doubt. The body of water upon which the injury occurred is a portion of the Willamette River which is concededly a navigable stream. Willamette Iron Bridge Co. v. Hatch, 125 US 1, 8 S Ct 811, 31 L ed 629; Port of Portland v. Reeder, 203 Or 369, 280 P2d 324. Tugs, the largest of which has a draft of nine feet, ply in and out of the lagoon. The hopper upon which plaintiff met with his injury was towed in a barge by tug owned and operated by the defendant to the lagoon from Sun Dial Beach on the Sandy River, a tributary of the Columbia River, and afterwards was taken by the same means to Cathlamet on the Columbia River in the state of Washington. The tug referred to was 50 feet long. It was used to tow sand and gravel "from one job to another," going at times to Ilwaco, Washington, about three miles from the mouth of the Columbia River and up the Columbia as far as the Bridge of the Gods.

The test for determining what are navigable waters of the United States was thus stated by Mr. Justice Field in The Daniel Ball, 77 US 557, 563, 19 L ed 999:

> "* * * The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great

distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

See, also, Crowell v. Benson, 285 US 22, 55, 52 S Ct 285, 76 L ed 598; Daily v. City of New York, 128 Fed 796 (SD NY 1904); 1 Benedict on Admiralty (6th ed) 94-96.

The evidence discloses that the body of water in question fully meets this test. It is navigable in fact and therefore in law, and forms "by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." The fact that the defendant owns the land partially surrounding the lagoon does not militate against this conclusion. United States v. Chicago, M & St. P. & P. R. Co., 312 US 592, 596-597, 61 S Ct 772, 85 L ed

1064. The government has drawn harbor lines around the land, but whether water is inside or outside harbor lines is not a test of navigability. See Port of Portland v. Reeder, supra. People v. The Commissioners of Land Office, 202 App Div 240, 196 NYS 115, cited by the plaintiff, is not in point. Other facts to which plaintiff calls attention, such as that the defendant has no permit from any governmental authority to dredge sand in the lagoon; that it has enlarged the area of the lagoon and diminished that of the land, that it charges owners of log rafts for the privilege of parking them in the lagoon; and has erected therein piling and structures which may constitute obstructions to navigation, we believe to be irrelevant.

We are brought thus to the question of the application to this case of the Longshoremen's and Harbor Workers' Act of 1927. This is a question of federal law and the decisions of the Supreme Court of the United States are, of course, controlling.

Ten years before the Longshoremen's and Harbor Workers' Act was passed the Supreme Court reversed a judgment of the New York Court of Appeals which sustained an award of compensation under the New York Compensation Law to the widow and children of one Jensen, who was accidentally killed while working as a stevedore unloading cargo from a vessel berthed in the North River, navigable waters of the United States. Southern Pacific Co. v. Jensen, 244 US 205, 37 S Ct 524, 61 L ed 1086, LRS 1918C 451, Ann Cas 1917E 900 (1917). The reasoning of the court was as follows: Article III,

§ 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," and Article I. § 8, confers upon Congress the power "To make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Pursuant to this provision Congress enacted the Judiciary Act of 1789, which gives to the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Congress has the power to fix and determine maritime law throughout the country, and, in the absence of a controlling statute, general maritime law, as accepted by the federal courts, is applicable to matters within the maritime and admiralty jurisdiction. The work in which Jensen was engaged, his contract of employment, and his injuries were all maritime, and the rights and remedies of the parties were within the maritime jurisdicton. Further, since the remedy of the Compensation Act was wholly unknown to the common law, it was not saved to suitors from the grant of exclusive jurisdiction in the Judiciary Act. It was therefore concluded that the New York statute, as attempted to be applied, "works material prejudice to the characteristic features of the general maritime law [and] interferes with the proper harmony and uniformity of that law in its international and interstate relations."

This was a five to four decision, Justices Holmes and Pitney wrote dissenting opinions, both of which were concurred in by Justices Brandeis and Clarke. There has been considerable dissatisfaction with it both among commentators and in the Supreme Court itself, but it has never been overruled, and it was cited as recently as 1953 as controlling authority. Pennsylvania Railroad Co. v. O'Rourke, 344 US 334, 73 S Ct 302, 97 L ed 367.

Following the Jensen case Congress twice amended the Judiciary Act in endeavors to secure to maritime workers the benefits of state compensation laws.[1] Both amendments were held unconstitutional on the authority of the Jensen case. Knickerbocker Ice Co. v. Stewart, 253 US 149, 40 S Ct 438, 64 L ed 834, 11 ALR 1145 (1919); Washington v. W. C. Dawson & Co., 264 US 219, 44 S Ct 302, 68 L ed 646 (1924).

Against this background, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act. A great deal of litigation followed in which the question involved was whether, under the circumstances of the particular case, application of a state compensation law interfered "with the proper harmony and uniformity of" maritime law, the test laid down in the Jensen case. This history is reviewed in Davis v. Department of Labor, 317

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[1]The Act of October 6, 1917, added to the savings clause of the Judiciary Act of 1789 the following: "and to claimants the rights and remedies under the workmen's compensation law of any State." The Act of June 10, 1922, amended this new matter so as to read "and to claimants for compensation for injuries to or death of persons *other than the master or members of the crew of a vessel* their rights and remedies under the workmen's compensation law of any State," etc. (Italics added.)

US 249, 63 S Ct 225, 87 L ed 246. See, also, Nogueira v. N.Y., N.H. & H.R. Co., 281 US 128, 50 S Ct 303, 74 L ed 754; 2 Larson, Workmen's Compensation Law, pp 409-413; Gilmore and Black, The Law of Admiralty, pp 344-348. If the workman was injured in an employment considered to be "maritime but local," that is, only indirectly connected with navigation and commerce, recovery under a state compensation law was permissible. The rule was thus summarized in Sultan Railway & Timber Co. v. Department of Labor and Industries, 277 US 135, 137, 48 S Ct 505, 72 L ed 820 (1928):

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. Grant Smith-Porter Co. v. Rohde, 257 U.S. 469; Millers' Indemnity Underwriters v. Braud, 270 U.S. 59; Alaska Packers Association v. Industrial Accident Commission, 276 U.S. 467."

Otherwise, the federal Act afforded the exclusive remedy, as provided in USC § 903. In many instances the problem of where to draw the line was extremely difficult, and fine distinctions were indulged so that it became well-nigh impossible in some instances to predict on which side of the line a particular case would fall. Two of the decisions of this court during this period are illustrative. In Mark v. Portland Gravel Co., 130 Or 11, 278 P 986 (1929), the plaintiff was injured while working as

engineer upon a dredge in the Columbia River, scooping up sand from the bed of the river and loading it on barges alongside for purposes of sale. The "local concern" doctrine was applied, and the plaintiff's remedy held to be exclusively under the State Compensation Law. The court relied on Grant Smith-Porter Ship Co. v. Rohde, 257 US 469, 42 S Ct 157, 66 L ed 321, 25 ALR 1008 (1922), in which the Supreme Court of the United States held that an injury sustained by the plaintiff while working as a carpenter on an uncompleted vessel on the Willamette River was compensable under the Oregon Compensation Law. In Martinson v. State Ind. Acc. Com., 154 Or 423, 60 P2d 972 (1936), the workman was, at the time of his injury, assisting in the loading of machinery on a barge moored to a wharf on the Willamette River at Portland. The barge, when loaded, was to be towed to Bonneville Dam on the Columbia River. This court held that the work in which the plaintiff was engaged was maritime in nature, under the rule that loading or unloading a vessel is not a matter of purely local concern (Northern Coal & Dock Co. v. Strand, 278 US 142, 49 S Ct 88, 73 L ed 232; Employers' Liability Assurance Corp. v. Cook, 281 US 233, 50 S Ct 308, 74 L ed 823), and that there could be no recovery under the State Compensation Law.

In 1941 the Supreme Court of the United States decided the case of Parker v. Motor Boat Sales, 314 US 244, 62 S Ct 221, 86 L ed 184. One Armistead was a janitor and handyman for a small store selling boats and maritime equipment. His work was almost entirely on land, but on the occasion in question he went out in a small

motor boat on the James River, the boat capsized, and he was drowned. The boat was being operated by a fellow employee on a test run. Armistead's duty at the time was to keep a lookout for hidden objects in the muddy river. His widow was awarded compensation by the Deputy Commissioner under the authority of the Longshoremen's and Harbor Workers' Act, the District Court affirmed, the Circuit Court of Appeals reversed, and the Supreme Court reversed the Circuit Court of Appeals and restored the original award.

As stated by Professor Larson, op cit 413:

> "This decision by the highest court appeared to scrap the 'local' exception to maritime employment, for the relation to navigation and commerce of a casual and unauthorized ride in a tiny outboard motor boat might seem to approach the vanishing-point."

See, also, Western Boat Bldg. Co. v. O'Leary, 198 F2d 409, 414 (9th Cir 1952).

Davis v. Department of Labor, supra, however, decided in the following year, cast a different light on the matter, at least with respect to the application of state compensation laws to maritime injuries. The question there was upon the application of the compensation law of the state of Washington to the case of an injury resulting in death sustained by Davis, a structural iron worker whose employer was engaged in dismantling an abandoned drawbridge which spanned the Snohomish River, a navigable stream in the state of Washington. Davis was on a barge to which steel from the bridge had been lowered for carriage to a place of storage a short

distance away. He was engaged in cutting pieces of steel into proper lengths for loading, and fell or was knocked into the stream and drowned. The Washington commission denied compensation and its ruling was affirmed by the Supreme Court of the state on the authority of *Jensen* and other United States Supreme Court decisions.

Without overruling the *Jensen* case the Supreme Court, in an opinion by Mr. Justice Black, held that the decedent's widow could validly be compensated under the Washington law. The court, after reviewing the confusion in the decisions following in the wake of *Jensen* and the difficulties encountered by employer and employees upon whom pressed "the horns of the jurisdictional dilemma" said:

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this federal act; but employees such as decedent here, occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." 317 US 253.

The court continued:

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.
>
> "Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to

> the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U.S.C. § 920, which provides that, in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra." 317 US 256-257.

In the *Davis* case the court did not have the benefit of findings of any agency, either federal or state. Indeed, four Washington state tribunals had rejected the claim. Nevertheless, the court, relying on the presumption in favor of constitutionality of the state statute, reversed the judgment of the Washington Supreme Court.

The radical departure from precedent in this decision is indicated when it is borne in mind that, as the Supreme Court of Washington said in its opinion (12 Wash2d 349, 121 P2d 365), Davis was working as a stevedore on a vessel in navigable waters loading cargo, and the Supreme Court of the United States had "uniformly held that the 'loading and stowing the ship's cargo' in navigable waters is a 'maritime service,' and that claims for injury incident thereto are exclusively within admiralty jurisdicton" (citing Atlantic Transport Co. v. Imbrovek, 234 US 52, 34 S Ct 733, 58 L ed 1208, 51 LRA (ns) 1157; Southern

Pacific Co. v. Jensen, supra; Nogueira v. N.Y., N.H. & H.R. Co., supra; Employers' Liability Assurance Corp. v. Cook, supra).

The scope and impact of the *Davis* decision became more apparent in the light of the decisions in two cases following it which originated in state courts. In Moores's Case, 323 Mass 162, 80 NE2d 478 (1948), the question was whether state compensation could validly be awarded to the claimant, who was injured while engaged in repair work on a floating dry dock, though his ordinary work was on land. Previously the Supreme Judicial Court of Massachusetts had held in O'Hara's Case, 248 Mass 31, 142 NE 844, in accordance with firmly established law, that the rights and liabilities of parties with respect to injuries received by workmen engaged in repair of a vessel lying in navigable waters (as distinguished from construction work on an uncompleted vessel) are governed by maritime law (Baizley Iron Works v. Spar, 281 US 222, 50 S Ct 306, 74 L ed 819 (1930); 2 Larson, op cit § 89.25), and that a dry dock, designed to receive vessels floating in navigable waters is itself part of the navigable waters and subject to admiralty jurisdiction. The Steamship Jefferson, 215 US 130, 30 S Ct 54, 54 L ed 125; The Robert W. Parsons, 191 US 17, 24 S Ct 8, 48 L ed 73. But, in view of the *Davis* decision, the Massachusetts court felt bound "to include within the 'twilight zone' the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs," and held that the injury was compensable under the State Compensation Law. The

judgment was affirmed by the Supreme Court of the United States without opinion on the authority of the *Davis* case, sub nom. Bethelehem Steel Co. v. Moores, 335 US 874, 69 S Ct 233, 93 L ed 417 (1948).

The other state case referred to was Baskin v. Industrial Accident Commission, 89 Cal App2d 632, 201 P2d 549 (1949). There the claimant's employer was engaged in repairing a vessel tied up at a wharf in San Francisco Bay. Claimant's work was almost entirely on land, but he was sent aboard the ship to perform a service in connection with the repair job and was injured. Compensation under the state law was denied, although the *Davis* case was considered by the court. Certiorari was allowed by the Supreme Court of the United States, which vacated the judgment in a per curiam decision and remanded the cause to the District Court of Appeals for reconsideration in the light of the *Moores* and *Davis* cases. 338 US 854, 70 S Ct 99, 94 L ed 523 (1949). On remand the California court reversed its former ruling (97 Cal App2d 257, 217 P2d 733 (1950)), certiorari was again granted, and the Supreme Court, in a memorandum decision, affirmed the judgment on motion (340 US 886, 71 S Ct 208, 95 L ed 643).

Chief Justice Qua, who wrote the opinion for the court in *Moores's Case*, described the "twilight zone" as "an area of doubt within which the two acts overlap and the injured workman may recover under either of them." He found support for that view in the concurring opinion of Mr. Justice Frankfurter in the *Davis* case, who said "Theoretic illogic is inevitable so long as the employee

in a situation like the present is permitted to recover either under the federal act * * * or under a state statute." 217 US 259. Chief Justice Stone, who dissented in the *Davis* case because he thought that the decision was not "within judicial competence" (317 US 260), said: "Congress by the enactment of the Longshoremen's and Harbor Workers' Act has left no room for an overlapping dual system of the sort which the Court now espouses, placing its decision on a new doctrine that recovery under either the state or the federal act is to be sustained if the case is thought a close one." 317 US 261. Circuit Judge Hutcheson in De Bardeleben Coal Corp. v. Henderson, 142 F2d 481 (5th Cir 1944), referred to "the first come first served" rule of the *Davis* case. Professor Larson says "given a borderline case, and given a presumption of coverage, it follows that all borderline cases are resolved in favor of coverage by the first act under which application is made by the claimant." Larson, op cit 414. This diagnosis, however, seems to be at odds with two United States Court of Appeals decisions which held that, notwithstanding a prior award of compensation by a state tribunal, an award under the federal Act should be sustained, payments theretofore made to the workman pursuant to the state law being credited upon the award made by the Deputy Commissioner. Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F2d 968 (4th Cir 1951); Western Boat Bldg. Co. v. O'Leary, supra.

We need not pursue this line of inquiry further. It is pertinent only insofar as it may throw light on one of the questions in this case, namely, does the "twilight zone" doctrine apply where the injured workman is not

seeking redress under any compensation statute but through the medium of an action at law? We think that it does not.

In enacting the Longshoremen's and Harbor Workers' Compensation Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter." Continental Casualty Co. v. Lawson, 64 F2d 802, 805 (5th Cir 1933), quoted in De Bardeleben Coal Corp. v. Henderson, supra; Travelers Ins. Co. v. McManigal, 139 F2d 949 (4th Cir 1944). The preoccupation of Congress was with the compensation of injured workmen regardless of fault. As Chief Justice Hughes said in the Nogueira case, 281 US 136:

> "When the bill which became the Longshoremen's and Harbor Workers' Compensation Act was pending in Congress, the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer, were distinctly recognized."

See to the same effect Davis v. Department of Labor, supra, 317 US 254; Norton v. Warner Co., 321 US 565, 570, 64 S Ct 747, 88 L ed 931. Damage actions were not the concern of Congress save in the single instance of the failure of an employer to secure payment of compensation as required by § 905 of the Act, in which case, as previously stated, the injured workman or his legal representative, if death resulted from the injury, may elect to claim compensation or to maintain an action at law or in admiralty for damages.

In our view, the "twilight zone" was a contrivance—

a "quasi-legislative decision," Judge Hutcheson called it in the *De Bardeleben* case—for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law. See Gilmore and Black, op cit § 6-52; 2 Larson, Workmen's Compensation Law, § 89.24. It was not recognized in Pennsylvania Railroad Co. v. O'Rourke, supra, which held that a railroad brakeman, injured when unloading box cars from a car float on navigable waters, could not maintain an action under the Federal Employers' Liability Act, but that his sole remedy was under the Longshoremen's and Harbor Workers' Act. See 344 US 341, footnote 8.

Of the numerous reported decisions which have followed the *Davis* case we have been referred to none where the doctrine was invoked to include a choice between an action for damages under state law and federal compensation except Chappel v. C. D. Johnson Lumber Corp., 112 F Supp 625 (D Oregon 1953), where the identical issue was presented, and the court held that, whether the plaintiff was in an exclusive federal area or within the "twilight zone," since he was not covered under the Oregon Compensation Law he could not maintain a common-law action and his sole remedy was under the Longshoremen's and Harbor Workers' Act. "The Act," the court said, "is automatic except in the limited circumstances provided for in the Act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act." The judgment in this case was

reversed by the United States Court of Appeals, but on another point. 216 F2d 873 (9th Cir 1954.)

See, also, Scrinko v. Reading Co., 117 F Supp 603, 608 (D NJ 1954).

Based on a suggestion in a scholarly law review article,[2] it is urged by counsel for the plaintiff that, since the Oregon Workmen's Compensation Act provides for an action against an employer who elects not to come under the Act in which the common-law defenses are not available to the defendant, the Act "would apply in toto." That is to say, that in a case such as this where the employer is not under the Act, the provision for an action at law would operate as a substitute for the compensation provision of the Act. We are not persuaded that such a course would accord with the intent of Congress. Nor do we find anything in the *Davis* case which supports it. Rather, we think that we should take for granted that the *Davis* opinion was intended to be limited to the kind of facts it dealt with and to the class of cases out of which emerged the "jurisdictional dilemma," which it was hoped would be dissipated and vanish in the "twilight zone." If, perhaps, a logical argument could be made for the suggestion, nevertheless, like Chief Justice Qua, we "recognize the futility of attempting to reason logically about 'illogic' " (Moores's Case, 323 Mass 167), and will not further attempt to illuminate so dark a subject.

We think this a case to which the Longshoremen's

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[2] "Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone" by Robert E. Rodes, Jr., 68 Harv L Rev 637.

and Harbor Workers' Act clearly applies, and that compensation under it is the plaintiff's sole remedy for his injury. He will not have lost this right through delay because, under § 913(a), (d), the one year's time allowed for filing a claim will not begin to run until the termination of this action.

In Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, supra, where the court sustained an award under the federal Act for an injury to a welder engaged in the repair of a graving dry dock, Circuit Judge Soper, writing the opinion for the court, said with reference to the decision of that court in Travelers Ins. Co. v. McManigal, 139 F2d 949 (4th Cir 1944):

> "* * * In that case we reviewed the decisions in border line cases of a maritime nature and endeavored to show the tendency of the courts, acting in the interest of humanity prior to the passage of the Longshoremen's Act, to enlarge the jurisdiction of state compensation commissions by developing the 'local concern' doctrine so as to enable state commissions to make awards to injured men, and the opposite tendency, since the passage of the federal statute, to adhere more strictly to the traditional principle that admiralty jurisdiction depends upon the location of the activities involved upon navigable waters * * *."

Among the cases exemplifying the more recent tendency we call particular attention to Radcliff Gravel Co. v. Henderson, 138 F2d 549 (5th Cir 1943). The employer in that case was engaged in the same business as the defendant here, namely, the dredging of sand and gravel from the bed of a navigable lake. The case involved the death by drowning of two employees. Their job was

trimming the sand and gravel as it was loaded onto barges to keep it from "forming a pyramid or being cone-shaped." The contract of employment provided that the employer was to furnish transportation to and from the shore and dredge boat. Several employees were drowned when a small boat, propelled by an outboard motor, in which they were being transported by their employer, capsized. Awards under the federal Act to the dependents of two of them were sustained, and this without reference to the *Davis* case or the "twilight zone." The case here is even stronger, for, at the time of his injury, the plaintiff was engaged in loading a barge. "A barge is a vessel within the meaning of the Act even when it has no motive power of its own." Norton v. Warner Co., supra, 321 US 571; Martinson v. State Ind. Acc. Com., supra. The loading of a vessel has a direct relation to commerce and navigation and is not a matter of purely local concern. Martinson v. State Ind. Acc. Com., supra; Pennsylvania Railroad Co. v. O'Rourke, supra; Employers' Liability Assurance Corp. v. Cook, supra; Northern Coal & Dock Co. v. Strand, supra. If it should be said that, notwithstanding the survival of *Jensen* (see the *O'Rourke* case, 344 US 337), decisions rendered during the "maritime but local" era are suspect, it nevertheless remains clear that under the *O'Rourke* and *Motor Boat Sales* decisions the present case comes directly under the terms of the federal Act. Section 903 provides for payment of compensation "if the disability or death results from an injury occurring upon the navigable waters of the United States," and § 904 defines the employer, who is made liable for the compensation, as "an employer any of whose employees

are employed in maritime employments, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The nature of the plaintiff's regular work, the fact, if it were such, that it was not maritime, is not controlling. "The statute applies," said the court in the *O'Rourke* case, "by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service." 344 US 339. Again, "Section 902(4) requires the employer to pay compensation if he has 'any' employees so engaged. If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime'." 344 US 341-342. The court said further, "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable waters." 344 US 337. In short (absent, at least, a choice between the federal and a state compensation law), the federal Act adopts the familiar rule that in tort cases the admiralty jurisdiction depends upon the locality of the injury. The Admiral Peoples, 295 US 649, 55 S Ct 885, 79 L ed 1633 (1935); O'Hara's Case, 248 Mass 31, 142 NE 844 (1924); Ford v. Parker, 52 F Supp 98 (D Md 1943). Cf. State Industrial Commission v. Nordenholt, 259 US 263, 42 S Ct 473, 66 L ed 933, 25 ALR 1013 (1922).

The following cases tend to support the conclusion at which we have arrived: Avondale Marine Ways v. Henderson, 346 US 366, 74 S Ct 100, 98 L ed 77 (1953); Green v. Simpson & Brown Construction Co., 14 NJ 66, 101

A2d 10 (1953); Standard Dredging Corporation v. Henderson, 150 F2d 78 (5th Cir 1945); De Bardeleben Coal Corp. v. Henderson, supra; Ford v. Parker, supra; Travelers Ins. Co. v. McManigal, supra.

We think that the judgment below was right and it is affirmed.

JUDGMENT OF OREGON SUPREME COURT

BE IT REMEMBERED, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem on the first Monday, the 7th day of October, 1957. WHEREUPON on this Wednesday the 22nd day of January, 1958, the same being the 22nd judicial day of said term, there were present:

William C. Perry, Chief Justice,
George Rossman, Associate Justice,
Hall S. Lusk, Associate Justice,
James T. Brand, Associate Justice,
Harold J. Warner, Associate Justice,
Wm. M. McAllister, Associate Justice,
Randall B. Kester, Associate Justice,
F. M. Sercombe, Clerk,

when the following proceedings were had:

HARRY A. HAHN, Appellant,	)	
v.	)	#225-544 Appeal from
ROSS ISLAND SAND & GRAVEL CO., a corporation, Respondent.	)	MULTNOMAH County

This cause on November 20, 1957, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT IS THEREFORE CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

The appellant having given an undertaking on appeal with Marie Erkenbeck as his surety conditioned that said appellant will pay all damages, cost and disbursements on appeal that may be taxed against appellant,

IT IS THEREFORE ORDERED that respondent have and recover of and from appellant and his surety its costs and disbursements in this court taxed at $192.00.

IT IS FURTHER ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.

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FILED
MAY 15
JOHN T. FEY, Clerk

1958

In the Supreme Court of the United States

No. [redacted] 52

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT T. MAUTZ,
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In the Supreme Court
of the United States

No.

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

The sole question presented in this Court, and the Oregon Supreme Court, is whether the petitioner is barred from maintaining a damage action on the grounds that the sole and exclusive liability of the respondent to the petitioner is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act (33 USCA Secs. 901-950).

STATEMENT OF THE CASE

In the Supreme Court of Oregon, the petitioner argued that the waters upon which the petitioner was injured were not "navigable waters of the United States"

within the meaning of the Longshoremen & Harbor Workers' Act (33 USCA Sec. 903). Petitioner does not make that direct argument in his petition; however, petitioner in his "Facts Material to the Question Presented" (Petition, pp. 5-6) makes erroneous statements of fact or states misleading conclusions, all dealing with the use of the lagoon and supposedly bearing on the question of navigability. The Supreme Court of Oregon stated:

> "It is contended first, on the part of the plaintiff, that the injury did not occur upon 'navigable waters of the United States', *but as to this we think that there can be little doubt.*" (Petition pp. 29-30) (Emphasis supplied)

ARGUMENT

I.

This action does not involve special and important considerations and arises only because of unique Oregon statutes.

Petitioner seeks to attach great importance to this action by contending that it will result in many employees being required to accept compensation benefits rather than the net proceeds of state damage actions.

Various members of this Court have stated that such a result is commendable rather than censorable. For example, the concurring opinion in *Wilkerson vs. McCarthy,* 336 U.S. 53, 69 S. Ct. 413, 419, stated:

> "This cruel and wasteful mode of dealing with industrial injuries (negligence damage actions) has long been displaced in industry generally by the insurance principal that underlies workmen's compensation laws."

Petitioner pleads that the decision of the Oregon Court places many thousands of "uncovered persons" in the serious predicament of going for years without any "redress, damages, or compensation" (Petition p. 11).

It is respectfully submitted that this plea is a patent attempt to mislead the Court. Petitioner's position really is that petitioner chose initially not to accept the benefits payable under the Longshoremen & Harbor Workers' Compensation Act. Rather, the petitioner decided to attempt to exchange immediate monthly compensation payments for the chance of a later, larger lump sum jury verdict. Petitioner, by this petition, is asking this Court to make his attempt at this exchange pay off. When petitioner fails, petitioner will immediately receive the three years' benefits he was initially entitled to under the Longshoremen & Harbor Workers' Compensation Act and then he will receive the current benefits to which he is entitled. Petitioner has one year from the final determination of this litigation to file a claim for benefits under the Longshoremen & Harbor Workers' Act (Longshoremen & Harbor Workers' Act, Section 913(a)(d)).

This Court is usually requested to grant life or freedom. This petitioner is requesting that he be granted a doubtful financial advantage; an advantage denied most of his fellow injured employees and one which can possibly be gained only because of the peculiarities of Oregon law.

The Oregon compensation laws are certainly peculiar,

if not completely unique. A State Industrial Accident Fund exists for the payment of compensation benefits. Employers electing to contribute to this State Fund are rewarded by being rendered immune from damage actions by injured employees. Employers not electing to contribute to the State Fund, but rather carrying private insurance coverage to pay workmen's compensation benefits or by being self-insured, are dissuaded from such a practice by being not immunized from damage actions by injured employees. The statute does not require employers electing not to contribute to the State Fund to carry workmen's compensation insurance coverage or to be self-insured. However, the long acceptance of the workmen's compensation principle, the force of organized labor, and the economics of the matter, have resulted in all Oregon employers of hazardous occupations carrying either state, private or self-insured coverage for workmen's compensation benefits. The petitioner was not an "uncovered" employee, nor are others in hazardous occupations "uncovered" employees in Oregon.

Actually, the petitioner here had three initial choices of possible remedies. He could have received compensation payable under the Longshoremen & Harbor Workers' Compensation Act; this he chose to temporarily reject. He could have claimed compensation benefits according to the schedule set by Oregon law from respondent's private insurance carrier (these benefits for most cases are less than those payable under the Federal act, just as are benefits payable from the State Fund). Of course, it is not known what response the in-

surance carrier would have made to such request. Petitioner instead chose the third method, a damage action, available to petitioner only because this respondent elected not to contribute to the State Industrial Accident Fund, but rather to carry private insurance coverage for workmen's compensation benefits.

This case, as well as all others in this general field, is an extremely interesting exercise in legal gymnastics. The parties, of course, consider it exceedingly important to them. This case, however, does not involve the solution of any important industrial or legal problem.

II.

The decision of the Oregon Supreme Court is not in error.

The opinion of the Oregon Supreme Court was based upon two premises; if the physical facts of the case placed the case in the "twilight zone," the "twilight zone" concept was not intended to apply here where the alternatives were a damage action on one hand and compensation under the Longshoremen & Harbor Workers' Act on the other. The second proposition of the Oregon Supreme Court was that the case was not within the twilight zone, but was "a case to which the Longshoremen & Harbor Workers' Act clearly applies" (Petition p. 46).

The Oregon Court did not believe that this Court intended to extend *Davis vs. Department of Labor & Industries*, 317 U.S. 249, 63 S. Ct. 225, to grant a preference to an employee of one remedy over another. *Parker vs. Motor Boat Sales*, 314 U.S. 244, 62 S. Ct. 221, and

Davis vs. Department of Labor, supra, granted an injured employee or the representative of a deceased employee a remedy and a remedy for which the employer had coverage. A contrary decision would have either denied the remedy, as a matter of finances, or would have subjected the employer to a financial responsibility he had not foreseen. In *Davis,* it could have subjected him to fine or imprisonment.

In the latest known work on this subject, the authors, *Gilmore and Black,* in *The Law of Admiralty,* page 357, state, after tracing the history of cases in this twilight area:

> "The Court has not yet articulated its reason for refusing to extend the twilight zone to cover workers whose choice of remedy is between a compensation proceeding and an action under FELA, the Jones Act or maritime law. Nevertheless, there is a substantial reason for the refusal. Where the choice of remedy is between two compensation acts, the employer's liability is not seriously affected by the rule that allows claims to be brought indifferently on either side: he is liable without fault in either case but only for the administratively determined award. Where, however, the choice is between a compensation proceeding and a court action with right of trial by jury there is a vast difference in what the employer may be ultimately held liable for. Twilight zone theory where the choice is between two compensation acts protects the class of workers without prejudicing their employers. The same theory, where the choice is between compensation and a jury trial, would protect other classes of workers, but at a substantial cost to employers. That far the court has not been willing to go."

If this case is held to be in the "twilight zone," it is difficult to conceive of any set of facts which will not be in the "twilight zone." A holding that this set of facts falls within the twilight zone will mean that no employee of an Oregon employer carrying private coverage or self-insured will initially accept benefits under the Longshoremen & Harbor Workers' Act. The pressure will certainly be present to first try his luck at a damage action and only if he fails in this will he accept Longshoremen & Harbor Workers' compensation benefits.

The petitioner's work was always on navigable water. True, the former "maritime-but-local" doctrine caused the Oregon Supreme Court to hold that a plaintiff who was working on a dredge in the river scooping up sand was confined to the state compensation law for his remedy. *Mark vs. Portland Gravel Co.,* 130 Ore. 11, 278 Pac. 986 (1929). On the other hand, during this same "maritime-but-local" time, the Oregon Supreme Court held that assisting in the loading of a vessel, as the petitioner was doing in this case, was maritime and not a matter of purely local concern. *Martinson vs. State Industrial Accident Commission,* 154 Ore. 423, 60 P.2d 972 (1936). The respondent was certainly an employer that "has any employees engaged in maritime service" (Sec. 902(4)). This fact was thought to be important by this Court in *Penn R. R. Co. vs. O'Rourke*, 34 U.S. 334, 73 S. Ct. 302. This employee, the petitioner, and this employer, the respondent, had a constant and direct relation with interstate commerce on navigable water.

This action was brought under a statute known as the Oregon Employers' Liability Act, Oregon Revised Statute 654.305, et seq. This law places a substantially higher standard of responsibility on the employer, and in other substantial ways changes the usual duties owed by the employer and employee. This Court has held that a damage action for injuries incurred on navigable waters is governed by Federal maritime law. *Pope & Talbot vs. Hawn,* 346 U.S. 406, 74 S. Ct. 202. A reversal of the Oregon Supreme Court decision would necessarily involve the application of the Oregon employers' liability law to a maritime tort. This would destroy any semblance of uniformity in maritime law. One of the Federal judges in the District of Oregon wrote:

> "In my view, the application of the Oregon Employers' Liability Act with the higher standards required of it in connection with the use of machinery and equipment would destroy the uniformity of the maritime law and is, therefore, not applicable to a situation in which a workman is killed on navigable waters within the territorial limits of Oregon." *Sanderson vs. Sause,* 114 Fed. Supp. 849, 852 (1953).

CONCLUSION

Petitioner's contention that this decision involves an important legal principle affecting many persons is without substance. Petitioner has sought a remedy thought to be more advantageous than that normally available to an injured employee and a remedy that is only possibly available by reason of the peculiarity of the Oregon Workmen's Compensation Act. The Long-

shoremen & Harbor Workers' Act provides an adequate and petitioner's sole remedy.

Petition for a writ of certiorari to the Supreme Court of the State of Oregon should be denied.

Respectfully submitted,

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OCTOBER TERM [redacted] 1958

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HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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In the Supreme Court
of the United States

OCTOBER TERM 1957

No. 938

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

Respondent charges that petitioner makes "erroneous statements of fact or states misleading conclusions" in his petition (Resp. Br. 2). Nowhere is this accusation documented. At page 3, petitioner is accused of "a patent attempt to mislead the court." Unfounded charges of this nature should not be made. There is little doubt petitioner could obtain federal benefits. All his difficulty arises from his consistent attempt to obtain state relief. That was clearly stated at page 11 of the petition.

Following these denouncements, respondent narrates the conduct of Oregon employers who reject the Workmen's Compensation Act — how petitioner somehow could have obtained private compensation benefits— how petitioner could have entered into private negotiations with some unidentified private carrier of respondent of unknown attitude (Resp. Br. 4, 5). None of these statements have support of citation from the record— and are, in fact, wholly without support. The entire record on this subject, based upon stipulation, is (Tr. 97):

(1) respondent rejected the Compensation Act [this it did pursuant to ORS 656.022, Petition 21];

(2) respondent provided insurance to cover its liability under:

(a) the rejected Act [this liability is set by the Act in ORS 656.024, Petition 22], and

(b) the Employers' Liability Act [this liability is set by the Act in ORS 656.006, Petition 21].

What respondent now seeks further to *ex parte* tell this court is not only entirely *dehors* the record, but it is also *dehors* the Compensation Act. Correct or not [and we have no way of knowing which], the volunteered information is irrelevant.

Apparently to show that petitioner's plight is only local in nature, respondent stresses that the Oregon Compensation Act is unique and peculiar (Br. 3, 4, 8)— a contention also unsupported by citation. Petitioner pointed out in his petition (9, 13, 14) the "great varia-

tions" in compensation laws of the 48 states. Yet, in about one-half the Acts, one common feature is that such are elective (Petition 9, 10). Oregon also has an elective Act (ORS 656.022, Petition 21). Elective Acts invariably provide for actions at law with certain sanctions against rejecting negligent employers (Petition 10). So, too, in Oregon (ORS 656.024 and 656.006, Petition 22, 21). There is nothing unique about that. The Oregon Act would be peculiar if it did not so provide—also it would be unenforceable.

Provisions such as ORS 656.024 (Petition 22) and ORS 656.006 (Petition 21) are properly for the purpose of *encouraging and coercing* employers to comply with the Act. The same is true of the last part of § 905 (33 USC) of the Longshoremen's Act (Petition 20). And the same is true in the 25 elective states (Petition 10). Without such provisions, the Acts in elective states would be a farce. If an employer, for its own purposes, desires nevertheless to reject the Act, its plaintive voice cannot be heard to cry that it is unconstitutional to apply the substitute remedy *provided by the very Act it rejected* (ORS 656.024, 656.006). To allow employers the initial luxury of rejecting the elective Act, and then to escape the consequences of the substitute remedy thereafter would completely subvert the humanitarian purposes of the Compensation Acts. When respondent rejected the Act, it know it was subjecting itself to liability under ORS 656.024 and ORS 656.006. Yet, weighing the consequences, it still rejected the Act. If respondent here successfully escapes the consequences, its victory will not remain unnoticed by employers in the other 25

elective states. Workmen under such Acts, and the entire concept of liability without fault, will suffer.

If the Employers' Liability Act is as drastic a remedy as is suggested by respondent (Br. 8), it is doubtful that respondent would have voluntarily subjected itself thereto by rejecting the Compensation Act—particularly as to its land based employees. In any event, this particular action could have been successfully maintained without any aid from the Employers' Liability Act or from the removal of defenses provided in ORS 656.024. Respondent's negligence was basic. It sent petitioner, at night, up a strange ladder that was so rotten it broke away before he got to the top (Tr. 46, 47). That is reprehensible conduct under any law. Respondent's attitude in this litigation and as expressed in its brief is significant. It apparently feels it can cavalierly deny its employees all state compensation benefits, escape the substitute state remedies, and force its employees out of the state and into federal jurisdiction.

Respondent's concern expressed at page 2 over the fate of the poor working man who cannot get compensation produces a hollow echo. It was the sole and exclusive act of respondent that deprived all its workers of compensation. Now respondent wants to deprive petitioner of his substitute remedy because it will be cruel not to give him compensation!

This court has already decided that in "twilight zone" instances, state law may apply. That questioned state laws are presumed to be constitutional (see Petition 13). There is nothing inimical to that proposition in *Pope &*

Talbot v. Hawn, 346 U.S. 406, 74 S. Ct. 202, cited by respondent at page 8.

Respondent refers to this field as "legal gymnastics" (Br. 5). It may be such to respondent. It is not to petitioner, nor to the other "twilight zone" employees whose employers have *ex parte* rejected State Compensation Acts. To these employees this is not any interesting legal maneuver. Under elective compensation laws, employers may legally reject the Acts. But if they do so, it must be with the clear understanding that they are not going to be able to hide behind the U. S. Constitution when their injured employees assert the substitute or alternative remedies provided by the compensation laws. To have effective compensation laws, this is essential.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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No. 52

In the Supreme Court
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OCTOBER TERM 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE PETITIONER

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No. 52

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OCTOBER TERM 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon (R. 103-120) is reported at 66 Or Adv Sh 117, 320 P2d 668.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered January 22, 1958 (R. 121). Petitioner's petition for rehearing (R. 122) was denied February 18, 1958 (R. 123). Petition for a Writ of Certiorari was filed April 21, 1958, and was granted June 2, 1958 (R. 123). The jurisdiction of this Court rests on 28 USC 1257(3).

QUESTION PRESENTED

1. An employer, *ex parte,* rejects a state workmen's compensation act;

2. His "twilight zone" employee is injured through the employer's negligence;

3. The employee would be entitled to state compensation benefits but for the employer's rejection;

4. The compensation act grants such employee another remedy against the employer;

Is the employee prevented by the U. S. Constitution and the Longshoremen's Act from exercising such substitute remedy?

The Oregon Supreme Court says: "Yes, such injured employee has no state remedy whatsoever."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are:

(a) U. S. Constitution:

Art III, Sec 2, cl 1.
Art I, Sec 8, cl 18.

(b) Federal Statutes:

Longshoremen's and Harbor Workers' Compensation Act.
33 USC 903.
33 USC 905.

(c) Oregon Statutes:

Workmen's Compensation Act.

ORS 656.006.
ORS 656.022.
ORS 656.024.
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ORS 656.084(2).
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Employers' Liability Act.

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Safety & Health Conditions In Places of Employment.

ORS 654.010.
ORS 654.015.
ORS 654.035.

They are printed in Appendix A, infra, 27-35.

STATEMENT

1. Procedural History and Judgments Below

Petitioner, injured March 23, 1955 while employed by respondent, filed this action in the Circuit Court of the State of Oregon for the County of Multnomah. Prior to petitioner's employment, respondent had rejected the Oregon Workmen's Compensation Act (R. 55, 105). Pursuant to provisions of the Oregon Workmen's Compensation Act (ORS 656.006 and ORS 656.024, App. A 29, 30), petitioner brought this action. Petitioner's complaint alleged respondent's negligence, and violation of provisions of the Employer's Liability Act (R. 1-3, 103, 105). Respondent answered alleging that the Longshoremen's and Harbor Workers Compensation Act (33 USC 901 et seq.) was petitioner's exclusive remedy. This petitioner denied by reply (R. 7).

Upon trial, a verdict was returned for petitioner on February 10, 1956, in the sum of $38,242, and judgment was entered in that amount, plus costs (R. 12, 13). Thereafter, on respondent's motion, the trial court set aside the judgment for petitioner on the sole ground that the Longshoremen's Act was petitioner's exclusive remedy, and entered judgment for respondent (R. 15, 104). The reasoning of the trial court in granting respondent's motion is set forth at the time of respondent's motion for a directed verdict (R. 82).

Petitioner appealed to the Oregon Supreme Court, which on January 22, 1958, affirmed on the sole ground that the Longshoremen's Act was petitioner's exclusive remedy (R. 118). On February 18, 1958, the Oregon Supreme Court denied petitioner's petition for rehearing (R. 123).

2. Facts Material to the Question Presented

A. Respondent's Ross Island Operation

Respondent has been in the business of commercially dredging sand and gravel for private sale for many years. The product comes from the center (lagoon) of Ross Island, which island is located in the navigable Willamette River, State of Oregon (R. 20). The land portion of Ross Island is now shaped like a horseshoe. At the north end there is a single opening allowing the river to come in and form a lagoon (R. 28; See Ex. 4, R. 26, 85). The lagoon is a cul-de-sac (See Ex. 4). Respondent owns, in fee simple, all of Ross Island with no reservation whatsoever (including the east part which is sometimes called Hardtack Island), including all the

land under the lagoon (R. 20). The entire area owned by respondent is enclosed in red pencil on Exhibit 1 (R. 20, 83, 102). All of respondent's property was treated as a single parcel in the original patent from the United States in 1873; and was acquired by respondent as a single entity by deed (R. 20; Exs. A and B, R. 90-97, 102).

Respondent dredges sand and gravel from the bottom of the lagoon and digs away at the sides (R. 20), loading the product on barges, which are towed a short distance to respondent's rock crusher, which is also in the lagoon [(R. 50); see small "o" on Ex. 4, (R. 26, 85), in locating rock crusher in lagoon; Ex. 10, R. 38, 87]. There a conveyor belt conveys all the sand and gravel to shore for sale (R. 76).

Respondent has dredged out enormous quantities of sand and gravel from Ross Island, completely altering its appearance and greatly increasing the size and depth of the lagoon. [Compare Ex. D (R. 101, 102) which is a map of Ross Island in 1895, with Ex. 4 (R. 26, 85), and note the testimony of respondent's president (R. 76, 77), and the stipulation of parties (R. 20).] A large portion of the area between the two islands was originally dry land at least at low water, and has been dug away by respondent in dredging (R. 20).

Respondent operates and alters the lagoon as it pleases (R. 20), having driven hundreds of piling and placed cement piers and anchors throughout (R. 30, 67, 74, 75, 80); built and maintains large towers and tramway terminals in the center of the only entrance to

the lagoon (R. 76: see Ex. 4, R. 26, 85; Ex. 10, R. 38, 87; Ex. 25, R. 66, 89); built a large crushing and screening plant in the lagoon (R. 75); and rents for profit space in the lagoon for parking, breaking up and sorting log rafts and booms, at times blocking off large portions thereof (R. 66-71, 79, 80; see Ex. 4, R. 26, 85); sometimes respondent rents so much lagoon space to log rafters that it makes it difficult to conduct any other operations in the lagoon (R. 71, 79, 80); respondent would eject anyone from the lagoon who desired to stay there without paying respondent's lagoon rental rates (R. 78-80). The U. S. Government has drawn its harbor lines around the property owned by respondent, excluding the entire lagoon (R. 54, 55; Ex. C, R. 99, 102). Respondent's dredging has always been carried on without permit from any governmental authority, and it pays no royalties to any government for sand and gravel removed (R. 20).

B. Petitioner's Employment and Injury

Petitioner's regular employment with respondent was as an oiler on a dredge anchored to the shore (R. 30), dredging sand and gravel from the bottom of the lagoon (R. 29, 33). The place he worked is shown with a small inked "x" (R. 45) on Exhibit 4 (R. 26, 85). All of his work was in the lagoon. He never worked outside the lagoon (R. 27, 28).

March 23, 1955, petitioner did his regular dredge work for several hours (R. 35, 36); he was then ordered to the rock crusher (see small inked "o" on Ex 4 for location in lagoon; R. 50) to do cleanup work (R. 36).

Two of respondent's barges were next to the rock crusher in the lagoon (R. 36, 37). Respondent was transferring a gravel hopper or bin (used to load trucks with gravel on land, R. 36, 37) owned by respondent (R. 63, 73, 74), from one barge to the other (R. 37). [See the "o" (R. 45) on Ex. 4 or the "o" (R. 51) on Ex. 10 (R. 38, 87) for location of barges.] After a land based crane (R. 37, 57) had lifted the hopper from one barge and put it on the other, petitioner, on orders (R. 37), went up a ladder on the hopper to loosen the crane cable (R. 39). The ladder was nailed to the hopper (R. 42). Due to respondent's negligence, and total disregard of established safety rules for ladders (R. 105), the ladder pulled loose from the hopper as petitioner got to the top (R. 46). Petitioner landed on his back on the barge, with the ladder hitting him as it came down (R. 46), and he was seriously and permanently injured (R. 4, 105).

It was at night when petitioner was sent up the ladder (R. 46). Petitioner had never seen the hopper before (R. 50). The ladder was nailed to rotten wood, the whole top of the hopper being rotten (R. 47). There were no bolts or chains securing the ladder to the hopper (R. 47, 48). No one warned petitioner of the condition of the ladder or hopper (R. 48). Petitioner has not worked since his injury (R. 49). At the time of injury, petitioner was 57 years old (R. 4, 6). The hopper, despite its condition, was in continuous active use on land by respondent, and was to be barged across the Columbia River a short distance to Cathlamet, Washington, for use by respondent in connection with its sale of sand and

gravel, it having been brought into the lagoon by another barge from another nearby road job of respondent in Oregon (R. 62, 72).

3. Oregon Law in Relation to Respondent's Actions

The Oregon Workmen's Compensation Act is contained in ORS 656.002 through 656.590. Pertinent provisions are referred to in the next few paragraphs and are printed in Appendix A, infra, 29-31.

Petitioner and respondent were subject to the Workmen's Compensation Act at the time of injury. The Act provides such a sand and gravel operation is a hazardous occupation, and is under the Act [ORS 656.084(2), App. A, 31].

Injured workmen covered by the Compensation Act may only receive specified sums from the State Industrial Accident Fund, and such payments are in lieu of all other claims against the employer (ORS 656.152, App. A, 31).

However, petitioner was not covered by such payments under the Compensation Act because, pursuant to ORS 656.022 (App. A, 29) (part of the Compensation Act), respondent had, *ex parte*, rejected the Act (R. 55, 105).

ORS 656.024 (also part of the Compensation Act) provides that a rejecting employer is entitled to none of the benefits of the Act, and is liable in an action by an employee for injuries occasioned by the employer's negligence, default or wrongful act as if the Act had not been passed, and removes certain defenses (App. A, 30).

ORS 656.006 (App. A, 29) (also part of the Compensation Act) provides that where an employee is authorized under the Compensation Act to bring an action against his employer (see paragraph above), his action may, in applicable situations, be brought pursuant to the Oregon Employer's Liability Act (ORS 654.305 through 654.335; App. A, 31-34). It was pursuant to this provision of the Workmen's Compensation Act (ORS 656.006 as well as ORS 656.024, see paragraph above) that petitioner brought this action.

Respondent had private insurance coverage for its liability under the Oregon Workmen's Compensation Act as rejected (ORS 656.024) and under the Oregon Employer's Liability Act (ORS 656.006; 654.305-654.335) (R. 55).

SUMMARY OF ARGUMENT

Pursuant to the provisions of the Oregon Workmen's Compensation Act, which respondent could unilaterally reject, and did, petitioner was, in such event, entitled to sue respondent for negligence and violation of the Employer's Liability Act.

Petitioner was injured in a "twilight zone" situation.

The decision of the Oregon Supreme Court deprives a "twilight zone" employee of any state remedy if his employer rejects the Act.

About twenty-five states have elective acts similar to Oregon. In addition, there are thousands of "twilight zone" employees all over the United States that are not covered by compensation. This decision, if allowed to

stand, deprives all of them of any state remedy.

Congress never intended to pre-empt the field when it passed the Longshoremen's Act. To the contrary, it attempted to give all possible jurisdiction to the states.

Under the "twilight zone" doctrine as developed by this Court, the Oregon compensation statutes granting to petitioner this substitute remedy are presumed constitutional. The Oregon court ignored the presumption.

There is nothing inherent in the Oregon law involved here that prejudices the uniformity of general maritime law by allowing a recovery. Respondent was guilty of grave and elementary negligence.

Nor is maritime law prejudiced by a recovery under the Employer's Liability Act. No employer is in danger of being subject thereto involuntarily. No employer can be subject to the Employer's Liability Act unless it wants to be. The only way an employer is subject to the Employer's Liability Act is by rejecting the Compensation Act. Nor is the standard of care therein required unreasonable.

Workmen's compensation is socially necessary, humane and desirable. In order to effectively enforce workmen's compensation laws and require compliance in elective states, sanctions are necessary against potential rejecting employers. Thus, unless the statutory sanctions are enforceable against a rejecting employer, the great host of uncovered workers in the United States will increase instead of decrease.

Where the Compensation Act itself provides sanctions against rejecting employers, those sanctions should be treated and enforced, as a part of the Act.

ARGUMENT

The Oregon Supreme Court apparently tacitly agreed (or at least it did not deny) that this case falls within the "twilight zone" as defined in *Davis v. Department of Labor & Industries*, 317 US 249, 63 S Ct 225, 87 L Ed 246. Yet, the court held petitioner ineligible to recover under Oregon law because the recovery did not consist of workmen's compensation benefits as such—but rather was a judgment based on negligence and violation of provisions of the Oregon Employer's Liability Act. Thus, although the Workmen's Compensation Act specifically provides for the very action brought by petitioner against his rejecting employer, the Oregon Supreme Court strictly confined state recovery in the "twilight zone" solely to workmen's compensation payments. This results in petitioner having no state remedy whatsoever.

Many Employees Over the Whole Country Are Affected by This Decision

The significance of this holding is enormous. Obviously, it is important to petitioner that he be allowed local state redress. But it goes much further. There are millions of workers in the United States not covered by any compensation act. Many thousands, perhaps millions, of these people from time to time find themselves on the water or waterfront—on a dock, boat or barge—in a "twilight zone" situation, as did petitioner. This includes persons in all walks of life—carpenters, ship fitters, electricians, delivery men, plumbers, dredge operators, mechanics, helpers, truck drivers, general repairmen, and a host of others. Are all these people to be denied access to the local forum?

The importance of this is pointed up by Bulletin 161 (Revised), State Workmen's Compensation Laws, published by the U. S. Department of Labor, August 1957. At page 2, the following appears:

> "There are great variations in the provisions of the different [compensation] laws. They vary as to type of law, coverage, amounts of benefits paid, insurance requirements, and administrative procedures. Because of coverage limitations, and the fact that about half the laws are elective rather than compulsory, many thousands of workers are still unprotected by these laws. Estimates of the number of workers covered under the State and Federal programs vary. A recent estimate published in the Social Security Bulletin of the Health, Education, and Welfare Department states that in an average week of 1955, 39-40 million workers had protection under the State and Federal workmen's compensation programs. A few years before, the Chamber of Commerce had placed the number at 45 million, and the President's Commission on the Health Needs of the Nation at 35 million.
>
> "These estimates indicate that at most not more than 75 percent of the workers in this country are covered, and the number may be less than 60 percent. This leaves 25 to 40 percent of the total workers without protection under workmen's compensation for injuries suffered on the job. Many of these unprotected workers are included in the 2 million persons each year who suffer occupational injuries and deaths. The yearly average for such injuries and death for the 7 years 1946 to 1952, inclusive, was 17,529 killed or totally disabled for life, 86,243 partially disabled for life, and 1,911,800 more temporarily disabled—a yearly average total of 2,015,557 injuries and deaths."

At page 3, the following appears:

> "An elective act is one in which the employer has the option of of [sic] either accepting or

> rejecting the act, but in case he rejects it he loses the customary common law defenses—assumed risk of the employment, negligence of fellow servants, and contributory negligence. Although most employers elect to come under the act, some do not. In the latter case the employees may be unable to obtain compensation unless they sue for damages. * * *
>
> "Twenty-nine of the workmen's compensation acts are compulsory and 25 are elective for most of the employments covered."

These uncovered workers in the "twilight zone" should not be in the position of petitioner. Petitioner was seriously and permanently injured three and a half years ago. Because he wants to proceed according to his own state law (not federal), to date he has not received one cent in redress, damages or compensation. He is being forced to come to this Court merely to establish his right to maintain an action against his negligent employer who voluntarily, *ex parte* and unilaterally prevented petitioner from obtaining benefits under the state workmen's compensation act.

The question whether these uncovered workers may seek redress pursuant to appropriate state law is of extreme importance.

Petitioner Clearly a "Twilight Zone" Employee

Under the facts as stated supra (3-9), and as stated by the Oregon Supreme Court (R. 104-107), there can be no question that this is a "twilight zone" situation. Factually, it is as strong, or stronger, for state jurisdiction as the facts in the cases of *Davis v. Department of Labor & Industries,* 317 US 249, 63 S. Ct 225, 87

L Ed 246; *Moores' Case* (sub nom Bethlehem Steel Co. v. Moores), 335 US 874, 69 S Ct 233, 93 L Ed 417 (323 Mass 462, 80 NE 2d 478); or *Baskin v. Industrial Accident Commission*, 338 US 854, 70 S Ct 99, 94 L Ed 523 (89 Cal App 2d 632, 201 P2d 549) (sub nom Kaiser Co. v. Baskin), 340 US 886, 71 S Ct 208, 95 L Ed 643 (97 Cal App 2d 257, 217 P2d 733).

Congress Never Intended to Pre-empt the Field or Strictly Confine Recovery to Compensation

The Oregon Court stated:

> "In enacting the Longshoremen's and Harbor Workers' Compensation Act 'Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter.'" (R. 116).

This is most doubtful. The Act was a direct result of the decision in *Southern Pacific Company v. Jensen*, 244 US 205, 37 S Ct 524, 61 L Ed 1086. Twice Congress tried to undo the *Jensen* decision, but this Court struck down the efforts. The very wording of 33 USC § 903(a), (App. A, 27), shows that Congress wanted to give to the states everything this Court would allow (*Davis* case 317 US at 252, 253). The statute was the reluctant act of Congress attempting merely to fill a void created by the *Jensen* decision, where this Court prevented a state remedy. Had Congress wanted to pre-empt the field it could simply have placed all navigable water injuries under the Longshoremen's Act, and deleted the "may not validly be provided by state law" language.

Nor does the reference to "workmen's compensation" in 33 USC § 903(a) confine an injured workman to

workmen's compensation provisions of state statutes. As pointed out in *U. S. Casualty Co. v. Taylor* (CCA 4), 64 F2d 521, 524; cert. den. 290 US 639, 78 L Ed 555:

> "The phrase 'may not validly be provided by State law' obviously refers to the authority of the state to act and not to the inquiry as to whether a state has exercised its power."

(See also *Motor Boat Sales v. Parker* (CCA 4), 116 F2d 789, 793; reversed on other grounds, 314 US 244.) In fact, when the Longshoremen's Act was passed in 1927, five states (N.C., S.C., Miss., Fla. and Ark.) did not even have a workmen's compensation act. Obviously Congress did not intend to deprive injured workmen only in those states of all local remedy.

The remedy petitioner seeks is essentially the same as Congress provided when it enacted 33 USC § 905 of the Longshoremen's Act (App. A, 28); i.e., a workman injured by fault of his employer may sue the employer for damages for negligence with certain defenses removed, where the employer fails to secure payment of compensation as required under the Longshoremen's Act. In other words, as to non-complying employers, the result is approximately the same whether under state or federal law.

The "Twilight Zone" Solution—Presumption of Constitutionality

After years of agonizing hairsplitting on what was maritime employment, this Court in the *Parker v. Motor Boat Sales, Inc.*, 314 US 244, 62 S. Ct 221, 86 L Ed 184, and *Davis* (317 US 249) cases set up a

"twilight zone" area where the injured workman could choose his forum as between federal and state law. By means of presumptions, this Court made it clear it would sustain the workman in his choice of remedy (a recent case, *Richard v. Lake Charles Stevedores* (La) 95 So(2) 830, 831, cert. den. by this Court March 3, 1958, referred to this as "concurrent jurisdiction"). —If the workman chose a state remedy, he would be sustained by the presumption of constitutionality of the state law. The presumption of constitutionality applies to any state law under consideration (*Davis* case, 317 US at 257, 258)—thus, it is *presumed* that the application of the Oregon law in this case (ORS 656.006, 656.024, infra, 29, 30) is constitutional. The Oregon Supreme Court failed to consider or discuss the presumption of constitutionality. There is nothing inimical to this proposition in the case of *Pope & Talbot Inc., v. Hawn*, 346 US 406, 74 S Ct 202, 98 L Ed 143.

No Uniformity of Maritime Law Problem

The Constitution of the United States permits the application of one of 48 different compensation laws in such situations (*Davis* case, 317 US 249) and compensation laws do vary greatly (See Bulletin 161, supra 12). The only uniformity in the various Acts is in their consistent non-uniformity. Thus, there can be no sound reason for drawing the line against the same application of closely related state laws. Particularly is this true where the compensation law in question itself specifically provides for such a remedy by the workman if the employer rejects the Compensation Act.

Such provision appears in about one-half the Acts (supra 13), as in Oregon.

An examination of the facts in the instant case shows that respondent was inexcusably negligent. At night, respondent, without any warning, sent a 57-year-old man up a strange ladder affixed to a structure that was so rotten, and so poorly secured, that the ladder pulled completely away from the structure and fell to the ground as he was reaching the top (supra 7). Such conduct requires no special statute. It is common, ordinary garden variety negligence, reprehensible under any system of law, however conservative or liberal. And the above facts are undisputed. —No fiction, no high standard of care, no liability without fault concept, is necessary. Certainly the doctrine of ordinary negligence is not unknown to general maritime law. Nor would any common law defense have done respondent any good, as shown by the undisputed evidence.

ORS 654.010 (infra 35) requires employers to furnish a safe place of employment. ORS 654.015 (infra 35) forbids unsafe places of employment. ORS 654.035 (infra 35) authorizes the State Industrial Accident Commission to promulgate reasonable safety rules. Such rules have the effect of law, *Shelton v. Paris*, 199 Or 365, 367, 261 P2d 856.

In 1947 the State Industrial Accident Commission promulgated two simple rules as to fixed ladders: (1) They shall be firmly secured in place; (2) They shall be fastened to the structure with through bolts, rivets, or the like.

Petitioner set forth these two rules in his complaint. Respondent admitted them (R. 1, 5). The regulations are conservative and common sense. No one would quarrel with the soundness of either. Violation thereof would scarcely differ from ordinary common law negligence. They propound the obvious. In no way could the enforcement thereof conflict with general maritime law.

The measure of respondent's contempt for the welfare of its workers can be measured not only by its voluntary unilateral rejection of workmen's compensation, but also by its attitude toward those rules. At the trial respondent's president was asked when his company intended to have the ladder bolted to the hopper (as required by the safety rules). He replied that the hopper was built before the regulations were passed (R. 73, 74). —The regulations were passed in 1947 (R. 1, 5), eight years prior to petitioner's injury. The hopper was constructed in 1940 or 1942 (R. 74). Not only was it rotten—it was subjected to constant severe treatment requiring continual repair (R. 74). Yet apparently the respondent *never* intended to comply with the common sense rules calling for simple alteration and repair. Why? Because it erroneously felt it could rely upon the fact that its equipment was so ancient that it predated the regulations! A few bolts and sound boards would have prevented all of petitioner's injuries.

Rarely will a court witness more flagrant or cold blooded negligence of the most basic nature, without even the suggestion of a valid excuse. There is nothing

inherent in the facts or result that will prejudice any maritime law.

Assume for the moment that the provisions of the Employer's Liability Act were required in order to justify petitioner's recovery. If that act is as drastic a remedy as has been previously suggested by respondent, it is unlikely it would have voluntarily subjected itself thereto by rejecting the Compensation Act—particularly as to its land-based employees.

Nor is there any reason to fear that by holding for petitioner that maritime employers generally will be involuntarily subjected to some higher degree of care—unless they want to be. Under the statute, the employer is the sole determiner (ORS 656.022, infra 29). Respondent is only in this Court because it decided to take a chance and reject the Workmen's Compensation Act. It did this purely for its own purposes. It may have thought it was a little cheaper that way. However, upon finding out that its best interests are served by compliance with the Workmen's Compensation Act, the employer has an easy out. A simple letter to the State Industrial Accident Commission will put it back under the Act and out from under ORS 656.024 and 656.006 (infra 29, 30), in five days (ORS 656.028, infra 30).

The Employer's Liability Act does not make an "Involuntary Good Samaritan" out of anyone—to borrow a phrase from Dean Pound: (1) The Employer's Liability Act does not go nearly that far, and (2) no employer is subject thereto unless it, and it alone, voluntarily chooses to be.

Thus, this case differs from any that might be propounded as to a possible "twilight zone" between a compensation act on one hand, and the FELA, the Jones Act, maritime law or the like, on the other. In those situations it might be possibly arguable that any choice of the worker would subject his employer to contingent greater liability, involuntarily.

Finally, when the facts of respondent's operation are considered (supra 4-6), and compared with those of the *Davis* case, or considered on their own, it is preposterous to suggest that petitioner's recovery would work material prejudice to the uniformity of general maritime law in its international and interstate relations. Respondent had complete control over Ross Island and the lagoon and did wholly as it pleased therein. It was dredging sand from the lagoon for sale. Petitioner never left the lagoon. It was strictly a matter of local concern. The "twilight zone" doctrine was designed to cover just such a situation.

* * * * *

The Oregon Supreme Court, in arriving at its decision, places heavy reliance on the case of *Penn. Railroad v. O'Rourke,* 344 US 334, 73 S Ct 302, 97 L Ed 367, (R. 117, 119, 120). True, there is a superficial similarity between *O'Rourke* and the case at hand in that one involves the Federal Employers' Liability Act and this case involves the Oregon Employers' Liability Act. But there the similarity ends. This Court clearly stated in footnote 8 (334 US at 341) of the *O'Rourke* decision that no constitutional question was involved; only the interpretation of two federal statutes. This Court should

clear up this complete misapplication of the *O'Rourke* doctrine by the Oregon Supreme Court.

Sound Policy Requires That Petitioner Be Allowed to Maintain This Action

The Oregon Supreme Court obviously does not like the *Davis, Baskin* and *Moores* solution:

> "In our view, the 'twilight zone' was a contrivance—a 'quasi-legislative decision', Judge Hutcheson called it in the *De Bardeleben* case—for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law." (R. 116.)

Be that as it may, this Court recognized the unfortunate results of the *Jensen* decision, the appalling hardship to injured workmen, and rendered a practical solution. The *Jensen* decision assumes less and less formidable proportions as time goes on. (See e.g., *Standard Dredging Corp. v. Murphy*, 319 US 306, 309, 87 L Ed 1416, 1419.)

The decision of the Oregon Supreme Court creates the completely ridiculous anomaly of allowing employers in the 25 elective states to, *ex parte*, make a constitutional determination. That is, if the employer alone, selfishly or otherwise, decides it is best for him to comply with the state Act, his workmen may recover under state law. On the other hand, if the employer decides it is to his sole advantage to reject the Act, his workmen are constitutionally forbidden to recover under any state law. There are few employers who merit this power of constitutional decision.

The obvious purpose of ORS 656.024 and 656.006 (App. A, 29, 30) is to actively *encourage and coerce* employers to comply with the Compensation Act. The same provisions generally appear in all elective acts (See Bulletin 161, supra 13). That was clearly the purpose of Congress in putting the last portion of 33 USC 905 (App. A, 28) into the Longshoremen's Act. Without such provisions, the acts in elective states would be unenforceable. Non-compliance must be made *unpleasant*, or State Industrial Accident Commissions will have no one to administer. The restrictive decision of the Oregon Supreme Court will, to the contrary, actively encourage "twilight zone" employers all over the United States to reject elective compensation acts, and thus effectively prevent their employees from recovering under state law. Whereas, if the Oregon Supreme Court is reversed, the opposite will result. Employers, knowing that they will be subject to actions pursuant to provisions such as ORS 656.024 and ORS 656.006 (App. A, 29, 30) will be considerably less willing and eager to peremptorily reject the Act, as did respondent. Employers should not be allowed to use the U. S. Constitution as a device to thwart the humanitarian purposes of the workmen's compensation acts (See 68 Harvard Law Review 637, 647, 648).

If an employer, for its own purposes, desires to reject the Act, its plaintive voice cannot be heard to cry that it is unconstitutional to apply the substitute remedy *provided by the very Act it rejected* (ORS 656.024, 656.006). To allow employers the initial luxury of rejecting the elective act, and then to escape the

consequences of the substitute remedy thereafter is a modern example of having your cake after having eaten it. If respondent here successfully escapes the consequences, its victory will not remain unnoticed by employers in the other twenty-five elective states. Workmen under all such Acts, and the entire concept of workmen's compensation, will suffer.

It appears wholly illogical to say that the states can constitutionally apply compensation laws, but not other closely related, or substitute, laws. Workmen's compensation laws have a humane purpose—liability without fault. But there can be nothing unconstitutional in allowing a further remedy where there is grave fault as there was in this case—and particularly when the employer is solely responsible for the failure of the compensation provisions of the law to apply—and the compensation law itself provides for that further remedy. (For a generally related interesting discussion, see "Remedies For Personal Injuries to Seamen, Railroad Men, and Longshoremen," 71 Harvard Law Review 438, written by veteran Harvard Law Professor George K. Gardner.)

This Court has from time to time recognized the importance and desirability of workmen's compensation coverage. There can be no serious opposition to such views. The figures quoted, supra (12) are shocking. Millions of workers are still uncovered today. But rejecting employers under elective acts are not going to get under the acts so long as it is to their economic advantage not to do so. It is that simple. If this Court holds that where Workmen's Compensation Acts

provide reasonable sanctions against non-complying employers, as here, that such sanctions as a part of the Act are enforceable, employers are going to pause before happily rejecting Workmen's Compensation Acts. On the other hand, if "twilight zone" rejecting employers are allowed to completely escape the responsibilities of ordinary employers, the whole purpose of the sanctions will be subverted, and the lists of uncovered employees in elective states will grow.

The U. S. Constitution is a broad document, susceptible to intelligent and reasonable interpretation. It is nonsensical and unreasonable to leave any injured workman remediless in his own state only because his employer rejected the Act. The only reasonable interpretation that can be given is—in the "twilight zone" the states may constitutionally apply their workmen's compensation acts, *and* other laws which are supplemental thereto in the event the employer has failed or refused to provide workmen's compensation coverage. Such is only consonant with the Acts themselves. Petitioner, as well as the thousands of other uncovered "twilight zone" employees throughout the country, is entitled to such a reasonable interpretation of the U. S. Constitution.

Under elective compensation laws, employers may legally reject the Acts. But if they do so, it must be with the clear understanding that they are not going to be able to hide behind the U. S. Constitution when their injured employees assert their substitute or alternative remedies provided by the compensation laws. To have effective compensation laws this is essential.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

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APPENDIX A

U. S. CONSTITUTION

ARTICLE III—Section 2, Clause 1:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or, which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies tween two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

ARTICLE 1—Section 8, Clause 18:

"The Congress shall have Power * * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

FEDERAL STATUTES

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT:

33 USC 903:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through work-

men's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

33 USC 905:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

OREGON STATUTES

WORKMEN'S COMPENSATION ACT (ORS 656.002 to 656.590) PERTINENT SECTIONS:

ORS 656.006 EFFECT ON EMPLOYER'S LIABILITY LAW. ORS 656.002 to 656.590 do not abrogate the rights of the employe under the present employers' liability law, in all cases where the employe, under ORS 656.002 to 656.590 is given the right to bring suit against his employer for an injury.

ORS 656.022 EMPLOYERS ENGAGED IN HAZARDOUS OCCUPATIONS AS SUBJECT TO WORKMEN'S COMPENSATION LAW. (1) All persons engaged as employers in any of the hazardous occupations specified in ORS 656.082 to 656.086 shall be subject to ORS 656.002 to 656.590; provided, that any such employer may be relieved of certain of the obligations imposed by those statutes and shall lose the benefits conferred by those statutes by filing with the commission written notice of an election not to be subject thereto in any manner specified in those statutes.

(2) Where an employer is engaged in a hazardous occupation, as defined in ORS 656.082 to 656.086, and is also engaged in another separate occupation or other separate occupations not so defined as hazardous, he shall not be subject to ORS 656.002 to ORS 656.590 as to the separate nonhazardous occupations, nor shall his workmen wholly engaged in such separate nonhazardous occupations be subject thereto except by an election as authorized by ORS 656.034.

(3) Employers who are engaged in an occupation partly hazardous and partly nonhazardous come under ORS 656.002 to 656.590 as if the occupation were wholly hazardous.

(4) It is the purpose of this section that an occupation and all work incidental thereto and all workmen engaged therein shall be wholly subject to or

wholly outside the provisions of ORS 656.002 to 656.590.

ORS 656.024 ELECTION OF EMPLOYER ENGAGED IN HAZARDOUS OCCUPATION NOT TO CONTRIBUTE: LIABILITY OF EMPLOYER SO ELECTING. Before becoming engaged as an employer in any hazardous occupation defined by ORS 656.082 to 656.086, the employer may file with the commission a statement in writing declaring his election not to contribute to the Industrial Accident Fund, and thereupon shall be relieved from all obligations to contribute thereto. Such employer shall be entitled to none of the benefits of ORS 656.002 to 656.590 and shall be liable for injuries to or death of his workmen, which are occasioned by his negligence, default or wrongful act as if such statutes had not been passed. In any action brought against such an employer on account of an injury sustained by his workman, it shall be no defense for the employer to show that:

(1) The injury was caused in whole or in part by the negligence of a fellow-servant of the injured workman.

(2) The negligence of the injured workman, other than his wilful act committed for the purpose of sustaining the injury, contributed to the accident.

(3) The injured workman had knowledge of the danger or assumed the risk which resulted in his injury.

656.028 RECALL OF REJECTION; EFFECTIVE DATE. An employer who has elected not to contribute to the Industrial Accident Fund may at any time recall such rejection by filing written notice with the commission of his election to become subject to ORS 656.002 to 656.590. Upon such election becoming effective, the employer shall be and continue in all respects subject to such statutes. Such election shall become effective five days after the filing thereof, unless otherwise stipulated between the

commission and the employer.

ORS 656.084 LIST OF HAZARDOUS OCCUPATIONS. The hazardous occupations to which ORS 656.002 to 656.590 are applicable are as follows: * * *

(2) The operation of gravel, sand or coal plants or bunkers; flour, feed or chop mills; creosoting or wood-treating works; garbage works; wood saws, stockyards, tanneries, grain elevators, rock crushers, briquet plants, ice plants, cold storage plants, canneries, milk condenseries, creameries, foundries, blast furnaces, mines, gas works, water works, reduction works, breweries, distilleries, wineries, wharves, docks, smelters, powder works or quarries.

ORS 656.152 WHAT ARE COMPENSIBLE INJURIES; RIGHT TO COMPENSATION AS IN LIEU OF CLAIM AGAINST EMPLOYER. (1) Every workman subject to ORS 656.002 to 656.590 while employed by an employer subject to ORS 656.002 to 656.590 who, while so employed, sustains personal injury, or injury to prosthetic appliances by accident arising out of and in the course of his employment and resulting in his disability, or the beneficiaries of such workman, if the injury results in death, are entitled to receive from the Industrial Accident Fund the sums specified in ORS 656.002 to 656.590. The repair or replacement of prosthetic appliances so injured shall be provided subject to the approval of the commission.

(2) The right to receive such sums is in lieu of all claims against his employer on account of such injury or death, except as otherwise specifically provided in ORS 656.002 to 656.590.

EMPLOYERS' LIABILITY ACT:

ORS 654.305 PROTECTION AND SAFETY OF PERSONS IN HAZARDOUS EMPLOYMENT GENERALLY. Generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and pre-

caution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

ORS 654.310 PROTECTIVE MEASURES TO BE OBSERVED REGARDING CERTAIN MACHINES, EQUIPMENT AND DEVICES WHICH ARE DANGEROUS TO EMPLOYES. All owners, contractors, sub-contractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the

safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

ORS 654.315 PERSONS IN CHARGE OF WORK TO SEE THAT ORS 654.305 TO 654.335 IS COMPLIED WITH. The owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

ORS 654.320 WHO CONSIDERED AGENT OR OWNER. The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

ORS 654.325 WHO MAY PROSECUTE DAMAGE ACTION FOR DEATH; DAMAGES UNLIMITED. If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if

none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

ORS 654.330 FELLOW SERVANT'S NEGLIGENCE AS DEFENSE. In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act or any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

ORS 654.335 CONTRIBUTORY NEGLIGENCE. The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

SAFETY AND HEALTH CONDITIONS IN PLACES OF EMPLOYMENT:

ORS 654.010 EMPLOYERS TO FURNISH SAFE PLACE OF EMPLOYMENT. Every employer shall furnish employment and a place of employment which are safe for employes therein, and shall furnish and use such safety devices and safeguards, and shall adopt and use such practices, means, methods, operations and process as are reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life and safety of such employes.

ORS 654.015 UNSAFE PLACE OF EMPLOYMENT PROHIBITED. No employer, owner or lessee of any real property in this state shall construct or cause to be constructed or maintained, any place of employment that is not safe.

ORS 654.035 SCOPE OF RULES AND ORDERS OF THE COMMISSION. The commission may, after a hearing had upon its own motion or upon complaint, by general or special orders, rules and regulations, or otherwise:

(1) Declare and prescribe what safety devices, safeguards or other means or methods of protection are well adapted to render the employes of every employment and place of employment safe as required by law or lawful order.

(2) Fix reasonable standards and prescribe, modify and enforce such reasonable orders for the adoption, installation, use, maintenance and operation of safety devices, safeguards and other means or methods of protection, to be as nearly uniform as possible, as may be necessary to carry out all laws and lawful orders relative to the protection of the life and safety of employes in employment and places of employment.

(3) Fix and order such reasonable standards for the construction, repair and maintenance of places of employment and equipment as shall render them safe.

(4) Require the performance of any other act which the protection of the life and safety of employes in employments and places of employment may demand.

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No. 52

In The Supreme Court of the United States

OCTOBER TERM, 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State Industrial Accident Commission of Oregon is the only entity authorized by law to provide workmen's compensation insurance, as such, in Oregon. By virtue of ORS 656.044, this state agency is also authorized to insure employers against their liability for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Though Oregon's workmen's compensation is "elective", respondent is among the small percentage of Oregon's affected employers exercising the election not to be subject to the law.

The interest of amicus curiae in this litigation is the adverse effect upon the construction and administration of Oregon workmen's compensation law and safety law if the decision of the Oregon Supreme Court is not reversed.

ARGUMENT

Workmen employed in areas of questionable jurisdiction should enjoy a twilight zone election of remedies regardless of the form of remedy.

The case and statute law are amply covered in the decision subjected to certiorari and the briefs pertaining to the application for the writ.

The demand for governmental services has developed a vast field of quasi-judicial administrative agencies. If there is one prime bane of bureaucracy it is the passion for pigeon holes. Everything must be black or white. The tops of countless desks remain forever cluttered while the administrator labors to decide whether the gray matter is black or white.

Is it repugnant to democratic processes to recognize a gray zone? The administrator is not bulwarked by the time, the briefs and the counsel to outguess the final review of every close question. *Davis v. Dept of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L. ed. 246 stands as a

landmark. It added flexibility to the administration of the law.

The respondent-employer and Oregon Supreme Court were concerned with lack of precedent for the particular choice of remedies in the case at issue.

From page 4, respondent's brief in opposition to petition for the writ, we note:

> "However, the long acceptance of the workmen's compensation principle, the force of organized labor, and the economics of the matter, have resulted in all Oregon employers of hazardous occupations carrying either state, private or self-insured coverage for workmen's compensation benefits. The petitioner was not an 'uncovered' employee, nor are others in hazardous occupations 'uncovered' employees in Oregon."

Respondent's insurance policies are a closely guarded secret, but if we accept this proposition, there is ample precedent in the Longshoremen's and Harbor Workers' Act and the *Davis* decision. Failure to secure benefits under the Longshoremen's Act subjects the employer to action for damages. Failure to secure the benefits provided by Oregon Workmen's Compensation Law subjects the employer to action for damages. The purpose of both laws is to penalize the employer for failure to secure a certainty of compensation. Respondent-employer complains that the uncertainty will upset the uniform administration of maritime law. Any uncertainty

is of respondent's choice. Having elected to expose itself to uncertainty, it should not be heard to claim this as a defense.

Respondent at page 8, brief in opposition to petition for the writ, states:

> "This action was brought under a statute known as the Oregon Employers' Liability Act, Oregon Revised Statute 654.305, et seq. This law places a substantially higher standard of responsibility on the employer."

Respondent would turn backward the clock in labor's struggle for a safe place to work. The higher standard of responsibility included a secure ladder, not one nailed to rotten wood. Did congress intend to destroy rights in enactment of the Longshoremen's and Harbor Workers' Act? Did congress intend to impair safety regulations in areas of local concern? May every sand and gravel operation of purely local concern violate state safety laws with impunity? The answers are negative.

It is submitted that not every body of water navigable in fact is navigable water of the United States. Among these waters are those created by private interests. The entire area of the accident was included within the United States Patent as the foundation of respondent's interest. The Patent refers to meander lines. We must assume that in 1873 there was no lagoon and no navigable

water. Otherwise we collaterally impeach the official United States survey, its meander lines and the United States Patent. If the respondent had created a lake on this island would the seeping waters of the Willamette River return jurisdiction to the United States? We think not. When the United States, by official Patent, deeds away an area with all appurtenances does a lagoon from a private lake to navigable waters destroy State jurisdiction over local matters in that lake? We think not. The area where respondent is now dredging was 20 feet above high water, with oak trees 4 feet in diameter (p. 77 Tr. of Record).

The public policy of the State of Oregon is also involved. The State imposes sanctions on employers failing to secure state compensation. The State, with its state fund insurance, remains liable for twilight zone injuries. The interpretation sought by respondent-employer frees respondent and its insurer from liability which would still attach to the state for its insured employers. The sanctions are destroyed and public policy reversed to the detriment of the class sought to be protected.

CONCLUSION

At a time when the Federal Government and this Court are being belabored for allegedly usurping functions of the States it seems apropos to suggest the States be reassured. The States should retain jurisdiction of local matters and those arising from twilight zones. The respondent-employer failed to secure state compensation, violated state safety regulations and now argues jurisdiction solely for measure of damages. The respondent elected not to be protected from action for his wrongs and should not now be allowed to invoke a purely maritime statute for compensation of labor to defeat State statutes for both protection and compensation of labor in areas of State concern.

Respectfully submitted,

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No. 52

In the Supreme Court of the United States

OCTOBER TERM 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF OF RESPONDENT

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Petitioner,

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ROSS ISLAND SAND & GRAVEL CO., a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF OF RESPONDENT

QUESTION PRESENTED

The question presented is whether or not the petitioner is barred from maintaining a damage action on the grounds that the sole and exclusive liability of the respondent to the petitioner employees is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act (USCA Secs. 901-950).

SUMMARY OF THE ARGUMENT

The petitioner's sole remedy is that remedy provided for under the Longshoremen & Harbor Workers' Com-

pensation Act, *supra*. Petitioner was injured upon navigable waters of the United States in a factual situation in which recovery through workmen's compensation proceedings could not validly be provided by state law. Petitioner is not attempting to claim compensation under state workmen's compensation proceedings. An affirmance of the Supreme Court of Oregon will not affect the whole principle of workmen's compensation.

Petitioner is not within the "twilight zone" as that area has been defined in *Davis v. Dept. of Labor & Industries*, 317 U.S. 249, 63 S. Ct. 225, and subsequent cases. Even if the petitioner factually fell within the "twilight zone," the overlapping remedies of that zone do not encompass a damage personal injury action as contrasted with federal compensation benefits.

Petitioner has sought recovery under a state employer's liability act, substantially different from general maritime law.

ARGUMENT

1. The injury occurred upon navigable waters of the United States.

The Longshoremen & Harbor Workers' Act is only involved if the injury occurs "upon the navigable waters of the United States." Petitioner has not directly argued that his injury did not occur "upon navigable waters of the United States," but, on the other hand, he has devoted two pages of his brief (pp. 4-6) to statements of fact, the purpose of which must be to convey the general impression "maybe the body of water technically

is navigable waters of the United States, but it shouldn't be." The brief of the Amicus Curiae may dispute the fact that the injury occurred upon navigable waters of the United States (pp. 4-5). It did occur upon navigable waters of the United States.

Each fact stated by the petitioner or the Oregon State Industrial Accident Commission as casting doubt on the fact that the injury occurred upon navigable waters of the United States has been judicially or legislatively rejected as irrelevant. Ownership of the land under the water; *Luscher v. Reynolds,* 153 Ore. 625, 56 P.2d 1158; *U. S. v. Chicago M. S. T. P. E. R. Co.,* 312 U.S. 592, 313 U.S. 543, 596, 61 S. Ct. 772, 775; dredging out existing body of water or creating new body of water, Secs. 780.010 and 780.030, Oregon Revised Statutes; riparian owner charging for moorage, 53 A.L.R. 1199; harbor lines, 33 USCA 404; *Port of Portland v. Reeder,* 203 Ore. 369, 380 P.2d 324; see *The David Ball,* 10 Wall 557.

The Supreme Court of Oregon stated:

> "It is contended first, on the part of the plaintiff, that the injury did not occur upon navigable waters of the United States, but as to this we think there can be little doubt." (R. 106)

2. An affirmance will not affect the humanitarian principle of workmen's compensation.

Petitioner's principle appeal is that the Supreme Court of Oregon should be reversed because, "if respondent here successfully escapes the consequences; * * * workmen under all such Acts (compensation Acts) and

the entire concept of workmen's compensation will suffer." (Pet. Br. p. 23).

"In order to effectively enforce workmen's compensation laws and require compliance in elective states, sanctions are necessary against potential rejecting employers." (Pet. Br. p. 10).

Somehow the petitioner is contending that requiring the petitioner to accept compensation under the Longshoremen & Harbor Workers' Compensation Act is a blow to the principle of workmen's compensation.

A brief explanation of the workmen's compensation law of the State of Oregon is sufficient to show the error and misleading nature of petitioner's appeal.

Oregon's workmen's compensation law is unique. It is not an ordinary "elective" workmen's compensation state:

> "The State Industrial Accident Commission of Oregon is the only entity authorized by law to provide workmen's compensation insurance, as such, in Oregon." (Br. of Amicus Curiae, p. 1) (Sec. 656.504, Oregon Revised Statutes).

If an Oregon employer engaged in a "hazardous occupation" does not file a notice electing not to be subject to the workmen's compensation law, such employer must contribute to the state industrial accident fund. Admittedly, the law encourages electing to be subjected to the workmen's compensation law. Electing to the contrary subjects the employer to damage actions by his employees and takes away the common law defenses (Sec. 656.024, Oregon Revised Statutes).

Contrary to the insinuation of petitioner, however, employers electing not to be subjected to the workmen's compensation law are not electing not to provide workmen's compensation benefits for their employees. They are electing not to provide such benefits through the state industrial accident fund. They are providing such benefits and securing the same by private insurance coverage, as respondent did here, or, in the instance of a few large employers, as self-insurers. Compensation benefits are payable under such policies or such self-insurance programs pursuant to the schedule contained in the Workmen's Compensation Act. There is no Oregon statute requiring employers electing not to contribute to the state industrial accident fund to provide workmen's compensation benefits or secure the payment of same. Certain obvious forces and the long acceptance of the workmen's compensation principle have compelled this condition.

Petitioner, in his reply to respondent's brief in opposition to petition for writ of certiorari (p. 2) expresses ignorance of the above facts.

The brief of Amicus Curiae, the State Industrial Accident Commission, states: "Respondent's insurance policies are a closely guarded secret * * *." (Br. p. 3).

The above facts were thought to be well known facts in the State of Oregon. A standard workmen's compensation and employers' liability policy form is printed in full in Appendix B hereto.

The form of policy in effect in 1932 was partially quoted in *Anderson v. Hartford Accident Insurance Co.*,

152 Ore. 505, 53 P.2d 710, 54 P.2d 1212. The court stated, starting at page 505:

> "At that time neither he (the employee) nor the Hudson Company (the employer) was subject to the Oregon Workmen's Compensation Act. However, there was then in force covering the Hudson Company a standard workmen's compensation and employers' liability policy of insurance which prior to the date of the accident had been issued to the Hudson Company by the defendant."

The policy provided, among other things, as follows:

> "This is a contract between the company and this employer for the benefit of any employee covered by this policy who receives an injury for which he would be entitled to compensation under the provisions of such law if this employer were subject thereto. It is the purpose hereof to provide voluntarily such compensation to such injured employee who will accept it in lieu of all other claims or demands because of such injury."

The workmen's compensation law of Oregon recognizes that there are such policies. Sec. 656.326(2) states:

> "If a joint employer not subject to ORS 656.002 to 656.590 secured a policy of insurance for the payment of benefits or compensation to a workmen, in case of injury in the course of his employment, * * *."

The "Chairman's Report of the Interim Committee on the Study of the Workmen's Compensation Law in Oregon, 1940" states at page 24:

> "Under the Oregon law employers may either accept protection under the state fund, take out insurance with an acceptable private carrier or act as self-insurers. * * *
>
> "There can be no doubt that the absence of the exclusive feature from the Oregon law greatly

complicates many problems. For example, changes in rates have to be made with great care due to the danger that some of the most careful and efficient employers insofar as safety work is concerned may withdraw and take coverage under private companies. Increasing benefit scales for claimants (raising cost to employers, of course) becomes more different to put into effect. A vicious cycle is set up as a result of which the abler employers tend to leave and the state fund has to carry the poor risk."

According to the "Forty-ninth Annual Report of the Insurance Commissioner for the State of Oregon" for the year 1956, private insurance companies received from Oregon for policies denominated "Employers' Liability and Voluntary Compensation" premiums for the year 1956 of $2,310.561.

There simply is no basis for petitioner's assertions that an affirmance here would cause the entire concept of workmen's compensation to suffer.

3. The "twilight zone" cannot be expanded to include cases of this type.

The Longshoremen & Harbor Workers' Compensation Act (33 USCA, Secs. 901-950) was passed in 1927. It was patterned after the New York State Compensation Act (*Robinson on Admiralty*, p. 109). It provides compensation for temporary and total disability, medical and hospital care and compensation for death. Fault as a cause of injury or death is immaterial. No federal fund is created to pay compensation or benefits. Employers must either secure insurance covering their obligations under the Act and furnish

proof of having such insurance, or qualify as a self-insurer. It was stipulated that the respondent had secured insurance covering his obligations under the Act (R. 55). There can be no rejection of the Act by the employer or employee. Acceptance of the Act is mandatory. If an employer fails to secure insurance or to qualify as a self-insured employer, the injured employee may still claim compensation and, in addition, the employer is subject to fine and imprisonment. Payment of benefits and compensation is automatic without any administrative award or order, i.e., in the event of injury, the deputy commissioner who administers the Act is given a report by the employer or insurance carrier and the employer or insurance carrier then makes payments directly to the injured employee. The deputy commissioner is not called upon to make any ruling unless the obligation to pay compensation or the amount of compensation is controverted by the employer or employee. Thus, in the instant case, in which the petitioner has not as yet claimed compensation under the Act, the deputy commissioner cannot make a ruling. The amount of compensation payable under the Act is generally comparable to the amount payable under the Oregon Workmen's Compensation Act, with compensation under the federal Act probably being slightly larger for most injuries.

The Act was the result of a long line of judicial decisions well known and frenquently recited by this Court.

The basis of federal power was primarily Article III, Section 2, of the United States Constitution which provides:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

This section was supplemented by such sections as Article I, Section 8:

> "The Congress shall have the power * * *
> "3. To regulate commerce with foreign nations and among the several states * * *."

This Court has always regarded these sections and the "all laws that shall be necessary and proper" section as being a grant of legislative power as well as a grant of judicial jurisdiction. See *The Thomas Barlum*, 293 U.S. 21, 55 S. Ct. 31.

A substantial number of matters of admiralty and maritime jurisdiction arise within state boundaries and are litigated in other than admiralty courts. This was a potential source of clash between federal legislative and judicial authority and state legislative and judicial authority. Conflict along this line was light and the border had not been judicially surveyed by 1917, the year of *Southern Pacific v. Jensen*, 244 U.S. 205, 37 S. Ct. 524. This case set the direction for the complete course in this area. The impact of the decision has frequently been blunted, but its underlying premise is reiterated by this Court almost every term. In *Southern Pacific v. Jensen*, Justice Holmes, in his dissent, p. 532, stated:

> "But hereto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman vs. New York*, 179 U.S. 552, 45 L. Ed. 314, 21 St. Ct. Rep. 212, the state law, common or statute, would prevail in the courts of the state."

In complete opposition, the majority stated, on p. 528:

> "And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and martime jurisdiction."

This language of the majority is repeatedly paraphrased in opinions of this Court. For example, in the majority opinion in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 205, it is stated.

> "Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under a national power to control 'its substantive as well as its procedural features * * * ' (case cited). Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court."

The basis and continuing premise of *Jensen* is that, as to things maritime, such as injuries on navigable waters, admiralty case law and federal legislative law

are supreme over state common law and state statute law.

This Court in *Davis v. Dept. of Labor & Industries*, 317 U.S. 249, 87 L. Ed. 246, 63 S. Ct. 225, stated:

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by the federal Act." (Page 227)

The majority clearly accepted the basic principle of *Jensen*.

The thread that respondent finds in *Davis* and the decisions of this Court subsequent to *Davis* is as follows: If the only fact invoking maritime or admiralty jurisdiction is that the injury occurred on navigable waters, the injured employee is in the twilight zone and has his choice of remedies of state compensation benefits or federal compensation benefits; this legal principle, replacing a demarcation line with a demarcation zone, while not capable of logical explanations, is capable of justification on the grounds that it provides workmen's compensation benefits to employees who were intended to have such benefits without the necessity of protracted litigation or meticulous legal prognostication.

In *Moore's Case*, 323 Mass. 462, 80 N.E.2d 478, 335 U.S. 874, 69 S. Ct. 233, the Massachusetts Court pointed out that the injured rigger's employment normally was not concerned with the water or federal and maritime matters, rather he did a major portion of his work on land. In *Baskin v. Industrial Accident Commission*, 338 U.S. 854, 70 S. Ct. 99 (89 Cal. App. 2d 632), 201 P.2d 549; 340 U.S. 886, 71 S. Ct. 208 (97 Cal. App.

2d 257), 217 P.2d 733, the injured materialman was specifically instructed not to go on ships at any time and he actually did only on two or three "tours of short duration."

This Court apparently is of the opinion that, if the only tie with admiralty and maritime law is that the accident occurred on navigable waters of the United States, the federal supremacy in admiralty and maritime law and the uniformity required therein will not be threatened by permitting an injured workman to receive compensation benefits according to the workmen's compensation laws of the state where he was injured. And further, despite the illogic of the result, a "twilight zone" is necessary in a certain area in order to provide a certain compensation remedy for injured workmen.

If this be a correct analysis, it is respectfully submitted that the "twilight zone" cannot be expanded to any great size because its existence is completely contrary to this Court's decisions in other fields of admiralty and maritime law.

In the field of personal injuries, this Court has repeatedly held, even if the only possible connection with the admiralty and maritime law is the place of injury, i.e., navigable waters of the United States, that connection is sufficient to make it "a type of action which the Constitution has placed under national power to control its substantive as well as its procedural features * * *," *Pope & Talbot v. Hawn, supra,* at page 409.

In *Garrett v. Moore-McCormack Co.,* 317 U.S. 239,

63 S. Ct. 246, the connection with maritime and admiralty was clear enough, the plaintiff being a seaman injured on board his vessel. The inapplicability of state law, however, was not as clear. The plaintiff brought his Jones Act case in the state court. The question was whether state law or admiralty law would govern the answer to the question of which party has the burden of proving the validity of a release. This Court stated:

> "Much of what we have said above concerning the necessity of preserving all of the substantial admiralty rights in an action as law in incompatible with the conclusion of the Court below. The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere ir dent of a form of procedure."

In *Pope & Talbot, Inc. v. Hawn, supra,* plaintiff was a carpenter who went on board the ship to make minor repairs on grant loading equipment. He brought an action against Pope & Talbot on the law side of the federal District Court. The question was whether or not contributory negligence was a complete bar, as it would be if state law was applicable, or whether contributory negligence was only to be considered in mitigation. A majority of the court held that state law could not apply as he was injured on navigable waters. Among other things, the court said:

> "Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling." (p. 409)

During the last term of this Court, this problem of

federal versus state law was again before the Court in *McAllister v. Magnolia Petroleum Company,* U.S. , 78 S. Ct. 1201:

> "The question in this case is whether a state court may apply its two-year statute of limitations to bar an unseaworthiness action that is joined with an action for negligence under the Jones Act."

The majority held that the state statute of limitations could not be applied, even though there was no federal statute because, if it were, "the result falls short of affording the seaman 'the full benefit of federal law' (case cited) to which they are entitled when state courts undertake to adjudicate claims under the federal maritime law."

This Court has been repeatedly holding that, in personal injury damage actions, either in the state court or on the civil side of the federal court, if the injury occurred upon navigable waters, state law could not be applied. The twilight zone cannot be expanded if the law in the instant type of case is to bear any semblance of consistency with the above-stated cases, and some consistency appears essential.

Aside from theoretical consistency, expansion of the twilight zone to the instant type of case would create additional vexatious judicial problems. If the Oregon workmen's compensation law could validly apply so as to enable petitioner to maintain a damage action against respondent, the whole Act ought to be applied to maritime injuries. Under the above cited cases, this does not seem possible, but how can one part of the Act, and a

very substantial part, permitting actions against privately insuring employers be applied and not others?

For example, a hypothetical case—a general contractor and a sub-contractor were making voyage repairs to a vessl lying in the Columbia River unloading her cargo and an employee of the sub-contractor, while on the vessel, was injured through the fault of the general contractor. The injured employee brought an action against the general contractor in an Oregon state court, or, on diversity jurisdiction, on the civil side of the federal District Court. The general contractor alleged as a defense that both it and the sub-contractor, the plaintiff's employer, were insured by the Oregon state industrial accident fund, both had joint supervision and control over the premises where the plaintiff was injured and, therefore, the plaintiff's action is barred. Under the Oregon Compensation Act, this is a perfectly valid and maintainable defense. Section 656.154 of the Oregon Revised Statutes states:

> "1. If the injury to a workman is due to the negligence or wrong of a third person not in the same employ, the injured workman, or if death results from the injury, his widow, child or other dependants, as the case may be, may elect to seek a remedy against such third person. However, no action shall be brought against any such third person if he or his workman causing the injury was, at the time of the injury, on premises over which he had joint supervision and control with the employer of the injured workman and was an employer subject to ORS 656.002 to 656.590."

Yet how can such a defense be maintained. Under the decision of *Pope & Talbot v. Hawn, supra,* it could

not. How can the Oregon compensation law as in the above-quoted section be applied as a bar? Yet, if the above-quoted section cannot be applied because the injury occurred upon navigable waters, how can other parts of the Act be applied? What determines which can validly apply and which cannot? Certainly, in Oregon, an expansion of the twilight zone to include this case would lead to a myriad of employee-employer litigation.

4. The facts of this accident do not place it within the "twilight zone."

In determining what falls on the exclusively federal side of the twilight zone, there appear to be two primary qualifications: (1) Did the injury occur upon navigable waters of the United States (this, of course, is a "must" in all cases)? (2) Were the general duties of the injured employee directly connected with water commerce and navigation, i.e., maritime employment, or was the work that the employee was doing *at the time of the accident* directly connected with commerce and navigation, i.e., maritime employment?

This Court, prior to *Davis v. Dept. of Labor & Industries,* considered whether or not the employees work, either generally or at the time of the injury, directly involved commerce and navigation, a definite criterion to determine whether state or federal law was applicable. For example, in *Sultan Ry. & Timber Co. v. Dept. of Labor & Industries of State of Washington,* 277 U.S. 135, 48 S. Ct. 505, 506, employees booming rafts for shipment and others breaking up

booms and guiding the logs into the mill were involved. The court observed:

> "In both instances, the place of work is on navigable water—in one it is done before actual transportation begins and in the other after the transportation is completed.
>
> "It is settled by our decisions that, where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

The court in *Parker v. Motor Boat Sales,* 314 U.S. 244, 62 S. Ct. 221, 223, stated:

> "The Circuit Court (116 F.2d 789, 793) was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen & Harbor Workers' Act would not apply because his employment was 'so local in character' that Virginia could validly have included it under its State Workmen's Compensation Act. This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance and other and different duties on land cannot alter the fact that, at the time of the accident, he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made"

The facts here are that the respondent certainly was an employer, some of whose employees are employed in maritime employment, in whole or in part, upon navigable waters of he United States (33 USCA 902(4)).

Respondent operated three tugs and ten barges on the Willamette and Columbia Rivers (R. 64, 65). The petitioner's general duties were exclusively on water. The petitioner stated:

> "My duties was to remove this barge—this barge that they was loading with this raw material, back and forth so they could spread it even." (R. page 26)

Plaintiff moved the barge by fastening a cable from a winch on another barge to be moved and then winching the barge to various positions (R. 30-32). He was transported to and from his work on the barge by a boat (R. 52).

At the time of his injuries, plaintiff was doing work directly with water commerce or navigation—maritime employment. He was injured while attempting to unloosen a cable by which cargo, a hopper in this case, had been moved from one barge to another. The wooden hopper was cargo moving in interstate water commerce, just as grain, petroleum products, paper products, etc., are cargo moving on Pacific Northwest waters. The hopper was loaded onto the barge on the Sandy River, an Oregon river which is a tributary of the Columbia, transported by water down the Columbia where the Columbia runs between Oregon and Washington, and then up the Willamette River, a river entirely in Oregon, to the place of the injury where it was loaded onto another barge. As had been contemplated, soon after the plaintiff's injuries, the barge with the hopper on it was transported by water down the Willamette to the Columbia and then down the Columbia to Cath-

lamet, Washington (R. 62). The plaintiff's job was "to help them load this gravel bin onto the barge (R. 36).

Petitioner "help(ed) to get the hopper set down on the barge * * * you (petitioner) had to turn it and set it down righ[t] * * * then you (petitioner) had to get the cable that was being used that was attached to the derrick loosened up so that you could get it" (R. 39). The hopper was moved by means of a derrick which had a cable hooked onto the hopper and after the hopper was stowed properly on the barge, plaintiff was going to unloosen the cable (R. 39).

The work that the plaintiff was doing at the time of his injury was exactly the same work that is done every day on the waterfront by longshoremen. Water cargo is generally loaded or unloaded by being lowered or raised by shore or vessel cranes, winches and so forth, with cables or slings attached to the cargo. These cables or slings are attached by longshoremen, sailors or harbor workers generally. The classification of employees doing the work is often determined by a collective bargaining agreement between a labor union and the employer. Obviously, there is the same direct relation to water commerce or navigation whether the cargo be a hopper bound for Cathlamet, Washington, or wheat bound for Pusan, Korea.

The Supreme Court of Oregon has already made a factual determination that the loading of a vessel is completely maritime. This was prior to the *Davis* case, but the factual determination has not changed. In *Martinson v. State Industrial Accident Commission*, 154

Ore. 423, 60 P.2d 972 (1936), the Oregon Supreme Court stated at page 426:

> "The loading of a barge or a ship has direct relation to commerce and navigation, is not a matter of purely local concern, and uniform laws in respect thereto are essential. So far as concerns the nature of the work to be performed, the loading of a vessel has as direct relation to commerce and navigation as the unloading."

The court held that the plaintiff could not recover compensation from the Oregon State Industrial Accident Commission.

In *Chappell v. C. D. Johnson Lumber Corp.*, 112 Fed. Supp. 625, 626 (Dist. Ct. Ore. 1953), District Judge Solomon stated:

> "In my opinion, the loading of a barge of 18 tons or more in navigable water is maritime in nature and injuries of a workman employed on such a barge are likewise maritime and the rights and liabilities of the parties in connection therewith are clearly within the admiralty jurisdiction and outside the reach of state compensation laws."

The Court of Appeals for the Ninth Circuit, in the same case, 216 F.2d 873, 874 (1954), stated:

> "The facts as submitted disclose a typical situation of maritime injury (citation). Accordingly, we accept the trial court's ruling that the case is not ruled by *Davis*, supra."

This Court, in *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 St. Ct. 302, at 304, stated by way of dictum that the injury was not covered by the twilight zone. There, of course, the question was whether the Federal Employers' Liability Act or the Longshoremen

& Harbor Workers' Compensation Act would apply. Petitioner was a freight brakeman who made up trains in a yard at Jersey City. He was injured while working on a car float. The court stated.

> "The 'Jensen line of demarcation between state and federal jurisdiction has been accepted.' *Davis vs. Dept. of Labor* (citation). *New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water.* (emphasis supplied.)

This case must fall on the exclusive federal side of the twilight zone—it happened on navigable waters; the respondent employer was substantially engaged in maritime work; the petitioner worked exclusively on navigable waters of the United States; his work at the time of injury was in the course of water commerce and navigation.

If this factual situation is held to place this case in the twilight zone, it is impossible to conceive of any factual situations which would not be within the twilight zone. The Longshoremen & Harbor Workers' Act would encourage rather than discourage litigation. There would seem to be no good reason why every employee injured on navigable waters, whose employer was subject to suit, would not try litigation. The employee really would have nothing to lose; if he lost the litigation, he would later take his benefits under the Longshoremen & Harbor Workers' Act.

5. The "twilight zone" does not apply to a choice between a damage action and a federal compensation proceedings, but only to a choice between federal and state compensation proceedings.

The *Davis* case and its successors are only authorities supporting a choice of remedies, federal and state, both of which are based upon the theory of compensation without fault, as opposed to a damage action based upon fault.

It is clear that the United States Congress enacted the Longshoremen & Harbor Workers' Act so as to give workmen covered by the Act the benefit of the compensation principle and not require them to rely on the principles of negligence, as the seamen desired to do. In *Davis v. Dept. of Labor & Industries, supra*, at page 254, it was stated:

> " * * * The purpose of the federal Act, which seeks to give 'to those hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation', and the state Act such as the one before us which aims at 'sure and certain relief for workmen.'" (Citing for this statement, Report of the Senate Committee on Judiciary on the Longshoremen & Harbor Workers' Compensation Act.).

Mr. Underhill, representative from Massachusetts and proponent of the bill, spoke on its behalf in the House at the time of its passage, as follows:

> "It (the bill) eliminates to a large extent the delay, suffering, hardship and expense incident to the long time in which it took to reach a case after it was submitted to the court because of the congestion in the courts, with damage cases crowding the docket." 68 Congressional Record, Page 5412.

Various members of this Court have on various occasions expressed their unfavorable opinion of basing recovery in employee cases upon fault. In *Rogers v. Missouri-Pacific R. R. Co.*, 352 U.S. 518, 77 St. Ct. 459, it is stated:

> "'One's deep sympathy, is of course, aroused by a victim of the hazards of negligence litigation in situations like the one before us. But the remedy for a obsolete and uncivilized system of compensation for loss of life or limb of crews on ships and trains is not intermittent disregard of the considerations which lead Congress to intrust this court with the discretions of certiorari jurisdiction. The remedy is an adequate and effective system of workmen's compensation', adequate in amount and especially prompt in administration. * * *. Finally, one cannot acquit the encouragement given by this Court for seeking a success in the lottery of obtaining heavy verdicts of contributing to the continuance of this system of compensation whose essential justice can hardly be alleviated by the occasional 'correction' in this Court of ill success."

In *Bailey v Central Vermont Ry., Inc.*, 319 U.S. 350, 63 S. Ct. 1062, the majority stated:

> "That method (liability by fault) of determining the liability of carriers and of placing on them the cost of these industrial accidents may be crude, archaic and expensive as compared with the more modern systems of workmen's compensation. But, however inefficient and backward it may be, it is the system which Congress has provided."

In this situation, Congress did provide a workmen's compensation system.

Congress, in drafting the Longshoremen & Harbor Workers' Compensation Act, limited it to "if recovery

for the disability or death through *workmen's compensation proceedings* (emphasis supplied) may not validly be provided by the state law." Congress did not say the federal Compensation Act should not apply if recovery for the injured could be obtained by state law, by damage action based upon state law, or use any other similar language. Congress used the words "workmen's compensation proceedings."

Samuel B. Horowitz, editor of N.A.C.C.A. Journal, writing in 1944 on "Injury and Death under Workmen's Compensation Laws" stated on pages 31-32:

> "In short, the twilight zone doctrine (allowing recovery under state compensation Act where the employer failed to obtain federal coverage) is now established under our law. It does not allow double recovery. It does not necessarily deal with the situation where the employer has two separate coverages * * * Dual jurisdiction in twilight zone cases where only one type of coverage exists is well established—a 'theoretical illogic' inevitably caused by an illogical 5 to 4 *Jensen* decision. The result is a fair one—it protects the worker and the one-policy-paying employer (whom the worker can no longer sue at law), at least it provides the one existing remedy, however, it does not necessarily solve the problem when two policies exist and two remedies are open; but if pressing one remedy causes the other to lapse or disappear for any reason, the twilight zone doctrine affords a sensible solution and the only possible relief to the injured workman."

Gilmore and Black, in "The Law of Admiralty," at page 357, state:

> "The Court has not yet articulated its reason for refusing to extend the twilight zone to cover workers whose choice of remedy is between a compensa-

tion proceeding and an action under FELA, the Jones Act or maritime law. Nevertheless, there is a substantial reason for the refusal. Where the choice of remedy is between two compensation acts, the employer's liability is not seriously affected by the rule that allows claims to be brought indifferently on either side: he is liable without fault in either case but only for the administratively determined award. Where, however, the choice is between a compensation proceeding and a court action with right of trial by jury there is a vast difference in what the employer may be ultimately held liable for. Twilight zone theory where the choice is between two compensation acts protects the class of workers without prejudicing their employers. The same theory, where the choice is between compensation and a jury trial, would protect other classes of workers, but at a substantial cost to employers. That far the court has not been willing to go."

In *Chappell v. C. D. Johnson Lumber Corp., supra,* the District Court stated at page 626:

"Even if plaintiff's work was within the penumbra where State and Federal authority overlap, in my opinion the only alternative is coverage under state compensation. The Act was designed to protect injured workmen in hazardous occupations without regard to fault. The rationale and history of the Act as set forth in the *Davis* and *Nogueira* (*Nogueira vs. New York, New Haven & Hartford Ry. Co.*, 281 U.S. 128, 50 S. Ct. 303) decisions require this interpretation of Section 3.

"In this case, state compensation was not available to the plaintiff for the reason that the employer elected not to come under the Oregon Workmen's Compensation Law. Plaintiff therefore seeks to enforce a common-law remedy predicated on his employer's fault. The choice here is not one between state and federal compensation as it was in the *Davis* case. In my opinion, this alternative is not

available to plaintiff for Congress only exempted seamen, at their own request, from automatic coverage, and did not give harbor workers the same privilege. The Act is automatic except in the limited circumstances provided for in the Act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act.

"Since plaintiff was not covered under the Oregon law, it makes no difference whether, at the time of the accident, he was in an exclusively Federal area or within the twilight zone."

The intent of *Davis v. Dept. of Labor & Industries, supra,* was to provide certainty of compensation benefits and not have an employee in a close situation choose one way and then have a court state later that that was the wrong way and the employee be barred from any compensation. That is not the situation here. Petitioner chose initially not to accept the benefits payable under the Longshoremen & Harbor Workers' Compensation Act. Petitioner instead decided to chance litigation in the hope of obtaining a large lump sum payment. When petitioner is unsuccessful in this litigation, he is immediately entitled to receive all the benefits that he could have received at the time of his accident and the current benefits to which he is now entitled. Petitioner has one year from the final determination of this litigation to file a claim for benefits under the Longshoremen & Harbor Workers' Act (Sec. 913(a)(d)).

6. Petitioner's action is based upon the Oregon Employers' Liability Act and this Act cannot be constitutionally applied to a martime tort.

In petitioner's second amended complaint, petitioner alleges that his injuries "were proximately caused by the carelessness, recklessness and negligence of the defendant and the failure of defendant to use every device, care and precaution which it was practicable for defendant to use for the protection and safety of the life and limb of defendant's employees, including plaintiff, without impairing the efficiency of said hopper in the following particulars:" (R. 3).

On the basis of this allegation, as well as perhaps other parts of the record, the Supreme Court of Oregon considered this "a personal injury action under the Oregon Employers' Liability Act * * * " (R. 103). Section 654.305, Oregon Revised Statutes (Pet. Br. 31) states, just as the petitioner stated in his complaint:

> "Generally, all owners, contractors, or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure * * *."

Petitioner asserts that no special statute was needed here and common law negligence would have sufficed (Br. 107), but also he is willing to argue that, even if the Oregon Employers' Liability Act were invoked, it would be a proper invocation (Br. 109).

The Oregon Employers' Liability Act is a unique

statute. Its standard of care is higher than "ordinary negligence." Contributory negligence can only be in mitigation (Oregon Revised Statutes Sec. 654.335; Pet. Br. 34). The defense of fellow servants is abrogated in some instances (Oregon Revised Statutes, Sec. 654.330; Pet. Br. 34).

In light of *Pope & Talbot, Inc. v. Hawn, supra,* and its successors, the Oregon Employers' Liability Act cannot apply in suits brought for maritime tort, such as this.

This was the view of the District Court for the District of Oregon in *Sanderson v. Sause,* 114 Fed. Supp. 849 (1953).

The United States Court of Appeals for the Ninth Circuit in *Henry L. Hess, Jr. v. United States of America,* No. 15685, decided on August 20, 1958, reached a similar conclusion. This case involved a death on the Columbia River and a suit under the Tort Claims Act. The plaintiff in that case was bringing his action under either the death provisions of the Oregon Employers' Liability Act or the Oregon Wrongful Death Statute.

The court at page 9 of its opinion stated:

> "The accident here in question actually occurred on navigable waters. In a suit between private persons, Oregon would have applied the general maritime law as supplemented by state statutes which will not work material prejudice to the characteristic features of the general maritime law."

On page 11, it is stated:

> "What appellant is asking for, however, would upset this balance in two particulars. While gaining,

as in the case of the Wrongful Death Act, an avenue of relief not available in admiralty, he would also (1) benefit from the increase in the standard of care which the Liability Law placed upon appellee, and (2) escape the more effective defenses which he would have to meet with the Wrongful Death Act being applied. In our view, the result would be an unconstitutional displacement of the essential features of general maritime law.

"We, therefore, conclude that the trial court did not err in holding that the Liability Law could not be constitutionally applied in this case."

CONCLUSION

Petitioner was injured on navigable waters of the United States. Before the decision in *Davis v. Dept. of Labor & Industries, supra,* his remedy would clearly have been compensation benefits under the Longshoremen & Harbor Workers' Act. Both Oregon and federal decisions provided decisive precedents that the Oregon Compensation Act would not be applicable. The *Davis* case provided relief for those injured workmen who might be remediless if the shadowy line dividing their remedies had been maintained and whose injuries occurred in such a manner that clear precedents were not available to guide their counsel.

Petitioner is not remediless. Respondent has secured payment of compensation under the Longshoremen & Harbor Workers' Act. Such compensation, retroactively, is payable to petitioner commencing at any time until one year after the termination of this litigation, and has been payable ever since the petitioner was injured.

Petitioner is seeking to expand the "twilight zone" so as to make state compensation laws co-extensive with

the Longshoremen & Harbor Workers' Act. Such an extension would be completely contrary to the decisions of this Court in other personal injury fields wherein the Court has positively announced the doctrine of federal supremacy for maritime torts.

Petitioner is seeking to extend the "twilight zone," not to a choice of workmen's compensation benefits, but to a choice of a damage action or federal compensation benefits. The petitioner has failed to show any need or desirability for such an extension, except a supposed financial advantage to this petitioner in this particular case. In order to be more certain of an advantageous result in this litigation, the petitioner has proceeded under a state law, the Oregon Employers' Liability Act, which is substantially different, not merely supplemental, from the general admiralty and maritime law. This basis of petitioner's action is contrary to lower federal decisions on this very question and contrary to the principles stated by this Court.

Respondent respectfully submits that petitioner has shown no reasons of humanity or law why the decision of the Supreme Court of the State of Oregon should be reversed; on the contrary, the admiralty and maritime decisions of this Court require that the decision be affirmed.

Respectfully submitted,

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APPENDIX A

ADDITIONAL FEDERAL STATUTES

33 USCA Sec. 404:

"Establishment of harbor lines; conditions to grants for extension of piers, etc.

"Where it is made manifest to the Secretary of the Army that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: Provided, That whenever the Secretary of the Army grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tidewater displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tidewater channels between high and low water mark, to such an extent as to create a basis for as much tidewater as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him."

ADDITIONAL OREGON STATUTES

Workmen's Compensation Act:

ORS 656.154. Injury due to negligence or wrong of a person not in the same employ as injured workman; remedy against such person.

"(1) If the injury to a workman is due to the negligence or wrong of a third person not in the same employ, the injured workman, or if death results from the injury, his widow, children or other dependents, as the case may be, may elect to seek a remedy against such third person. However, no action shall be brought against any such third person if he or his workman causing the injury was, at the time of the injury, on premises over which he had joint supervision and control with the employer of the injured workman and was an employer subject to ORS 656.002 to 656.590.

"(2) As used in this section, 'premises' means the place where the employer, or his workman causing the injury, and the employer of the injured workman, are engaged in the furtherance of a common enterprise or the accomplishment of the same or related purposes in operation."

ORS 656.326. Filing of claim for compensation by workman of joint employers as an assignment to the commission of any causes of action against nonparticipating joint employer and his insurer.

"(1) If a workman is employed jointly by two or more employers, one or more of whom are not subject to ORS 656.002 to 656.590, the filing of a claim by such workman or other beneficiary for compensation under ORS 656.002 to 656.590 constitutes an assignment to the commission of all rights and benefits or causes of action against any of his employers not subject to such statutes or under any insurance policy secured by such employers, for the protection of such workman in the event of injury.

"(2) If a joint employer not subject to ORS 656.002 to 656.590 secured a policy of insurance for the payment of benefits or compensation to a workman, in case of injury in the course of his employment, and such workman elects to take compensation under ORS 656.002 to 656.590, the commission may recover from the insurer that portion

of the insurer's liability which the amount of wages paid by the employer bears to the entire wages of the injured workman.

"(3) If a cause of action against a joint employer is assigned to the commission under this section, the commission may enforce the claim in the manner provided in ORS 656.312 to 656.324 for the enforcement of claims against negligent third parties."

Improvement and Use of Navigable Streams:

ORS 780.010. Stream improvement authorized; channel obstruction prohibited.

"Any person, association, or corporation may enter upon the channel or bed of any and all rivers and watercourses, navigable or susceptible of being made navigable, and perform work and labor thereon, and make such improvement of the same by clearing out or deepening the channel, constructing wing dams, blasting and removing rocks or ledges, removing sand bars, gravel bars, snags and all other obstructions to navigation, so as to render the rivers or any of them navigable at all seasons of the year or to improve the navigation. No work authorized by ORS 780.010 and 780.020 to be done shall be so done or conducted as to obstruct in any manner, either temporarily or otherwise, any channel or river now navigable, but the closing of one or more channels in any river in order to deepen or cause more water to flow in the main channel shall not be construed as constituting an obstruction to the navigation of any river or watercourse."

ORS 780.030. Channels improved are highways free to navigation.

"All channels of rivers and watercourses made navigable or the navigation of which is improved, as contemplated by ORS 780.010, shall be public highways, and shall be free to all steamboats and other crafts navigating them."

APPENDIX B

SECTION I—AGREEMENTS

THE UNDERWRITERS HEREBY AGREE with the Assured herein named, with respect to the coverages specifically indicated by a proper premium charge under Statement 5, subject to the limitations and conditions herein contained, as respects injuries and death as hereinafter defined, suffered or alleged to have been suffered by employees of the Assured during the performance of their duties as such employees, as a result of accidents arising or occurring while this policy is in force, by reason of the operation or prosecution by the Assured of the trade, business or work described herein:

1. Employer's Liability. To pay, within the limits specified in Statement 3, the loss from the liability imposed upon the Assured by law for damages on account of bodily injuries (not including occupational disease) and death resulting therefrom.

2. Workmen's Compensation. To pay voluntarily to any person entitled thereto, within the limits specified in Statement 3, and subject to Conditions 13 to 17, such compensation as would have been payable to such person under the Workmen's Compensation Law of the State of Oregon if the injured employee and the Assured had been operating under said law.

3. Occupational Disease. To pay, within the limits specified in Statement 3, the loss by reason of the liability imposed upon the Assured by law for damages on account of bodily injury and death caused by occupa-

tional disease which arises out of a business operation of the Assured covered by this policy and which results in occupational incapacity necessitating cessation of work during the policy period. With respect to this paragraph, the word "accident" and the word "injuries," wherever used in this policy, shall include occupational disease, as hereinabove defined.

4. Medical. To pay, within the limits specified in Statement 3, for medical, surgical, nurse or hospital services, or in the event of fatal injury, the funeral expenses, including medical or surgical apparatus or appliances and medicines furnished through physicians, surgeons and hospitals designated by the Underwriters, required by the injury defined in Agreements 1, 2 and 3, and for which insurance is provided hereunder.

5. Defense. To give prompt service (a) in investigating cases of bodily injury or death coming within the provisions of this policy, (b) in conducting negotiations for the settlement of any claims made on account of such cases of bodily injury or death, and (c) in defending any suit brought to recover damages on account of such cases of bodily injury or death unless or until the Underwriters may elect to effect a settlement of such claim or suit.

6. Expense. To pay: (a) all expenses incurred by the Underwriters for investigation, negotiation and defense of claims and suits: (b) all premiums on attachment and/or appeal bonds, and all costs taxed against the Assured, in any suit for damages on account of such injuries: (c) all interest accruing on the full amount of any

judgment in such suit, if on account thereof the Underwriters shall be liable for any payment under Agreements 1, 2 and 3, until the Underwriters shall have delivered their check to the judgment creditor or to his attorney of record, in payment of their liability under Agreements 1, 2 and 3, on account of said judgment.

7. Insolvency or Bankruptcy. Bankruptcy or insolvency of the Assured shall not relieve the Underwriters of any of their obligations hereunder. If any person or his legal representatives shall obtain final judgment against the Assured because of any such injuries, and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within thirty days after it is rendered, then such person or his legal representatives may proceed against the Underwriters to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of his policy applicable thereto.

8. Death of Assured. In the event of the death of the named Assured within the policy period, the insurance provided herein shall cover the legal representative of the named Assured during the unexpired portion of the policy period, provided that notice in writing is given to the Underwriters within thirty days after the date of such death.

9. Exclusions. This policy does not cover (a) the liability of others assumed by the Assured under any agreement, oral or written: (b) any employee while

working in violation of law as to age, or under fourteen years of age if no law restricts the age of employment: (c) any contract convict labor.

SECTION II—CONDITIONS

1. Notices. Any notices, which under the terms hereof, may be required to be given to or by the Underwriters, shall be deemed to be given when given to or by RATHBONE, KING & SEELEY (on behalf of the Underwriters) at Board of Trade Building, Portland, Oregon. The Assured shall forward to the Underwriters' representatives, RATHBONE, KING & SEELEY (a) written notice of every accident as soon as practicable: (b) prompt notice of every claim: (c) every summons and other process in suits as soon as served upon him.

2. Litigation. In the event of litigation under the terms of this Policy, Underwriters agree to accept service in the City of Portland, Oregon, and do hereby specifically designate Calvin N. Souther, Attorney-at-Law, Board of Trade Building, Portland, Oregon, as attorney for the acceptance of such service. It being understood that RATHBONE, KING & SEELEY of Oregon shall have authority at any time for and on behalf of Underwriters to change the designated person for the acceptance of service provided that there will always be one individual designated by RATHBONE, KING & SEELEY on behalf of Underwriters, in Oregon qualified to accept service of suit for and on behalf of subscribing Underwriters at Portland Oregon. It is understood and agreed that, in the event of a suit being instituted by the Assured against any one of the Underwriters hereon

who shall be selected from the whole body of Underwriters on the Lloyds' policy or policies concerned in the loss on which the same cause of litigation arises, and in respect of which a defense common to all Underwriters thereon can be set up, all the Underwriters on this Policy will be bound by the final decision of the courts and settle accordingly.

3. Settlements. The Underwriters shall have the right to settle any claim or suit at their own cost, and the Assured shall not voluntarily assume any liability nor incur any expense other than for immediate surgical relief, nor settle any claim, except at the Assured's own cost. The Assured shall not interfere in any negotiation for settlement nor in any legal proceedings, but whenever requested by the Underwriters and at the Underwriters' expense, the Assured shall aid in securing information and evidence and the attendance of witnesses, and shall co-operate with the Underwriters (except in a pecuniary way) in all matters which the Underwriters may deem necessary in the defense of any suit or in the prosecution of any appeal.

4. Premium. The premium shall be computed as provided in Statement 6 and if it is greater than the premium paid, the Assured shall pay the additional premium earned; if less, the Underwriters will return the unearned premium when ascertained but shall be entitled to not less than the minimum premium specified in Statement 5, except in the event of cancellation by the Underwriters or by the Assured when actually retiring from business.

5. Cancellation. This Policy may be cancelled at any time by either party by written notice to the other stating when thereafter cancellation shall be effective. Such notice by the Underwriters delivered or mailed to the Assured's address herein given, not less than Ten (10) days prior to effective date of cancellation, shall be sufficient notice. If cancelled by the Underwriters, or by the Assured when actually retiring from business, the earned premium shall be computed as provided in Condition 4. If, however, the final premium so computed is less than the prorata of the specified minmum premium the pro-rata premium of the minimum premium shall be charged. If cancelled by the Assured, when not retiring from business, the remuneration of employees for a full year subsequent to the effective date of this Policy shall be computed (using as a basis the actual remuneration earned to date of cancellation) and the Underwriters shall be entitled to the earned premium thereon, computed according to the usual short-rate table, but not less than said minimum premium. The check of the Underwriters or of their authorized representative delivered or mailed to the Assured's said address, as soon as the amount of unearned premium has been ascertained by the Underwriters, shall be a sufficient tender thereof.

6. Inspection and Audit. Assured shall furnish wage statements to the Underwriters' representative when requested. The Underwriters or their representative shall be permitted to inspect the said place or places of business or work at any reasonable time, and to examine the books and records of the Assured at any time during

the policy period, and within one year after its termination, as respects the remuneration earned by employees during the policy period, and the Assured shall render reasonable assistance. No statement rendered or previous settlement shall bar the said examination or the Underwriters' right to additional premium.

7. Subrogation. The rights of the Assured against other parties as respects any payment under this Policy shall, to the extent of such payment, be subrogated to the Underwriters, and the Assured shall execute all papers required to secure the Underwriters such rights.

8. Commutation. Established claims for compensation, resulting from the injury or death of employees and coming with the scope of this contract, shall be adjusted within two years from the expiration date of this policy on the following basis:

The total sum due said employee or employees from the Assured over the entire period for which such payment or payments are still due shall be calculated, and the said total sum shall then be commuted or discounted as calculated by an actuary or appraiser to be appointed by the Assured and the Underwriters jointly, and the lump sum so commuted may, at the option of the Underwriters, be paid to the Assured by the Underwriters as full and final payment for said Established Claims.

9. Other Insurance. The insurance afforded under this Policy shall be excess insurance over any other valid and collectible insurance carried by the named Assured.

10. Other Work. It is hereby understood and agreed that if, while this Policy is in force, the Assured shall engage in any work or business operations, at the locations specified in Statement 4, other than the work or business operations specifically described in Statement 5, this Policy shall cover such other work or business operations and the Assured shall pay to the Underwriters the premium therefor computed at the Underwriters' premium rate or rates applicable thereto, at the same discount from the rates charged by the Oregon State Industrial Accident Commission as has been given in the rates provided for the classifications as listed in Statement 5.

11. Additional Coverage. If any employee shall sustain injury or death during the course of his employment and if such employee or his legal representative shall file a claim for compensation with the State Industrial Accident Commission of the State of Oregon and shall be found by ruling of such commission or by order of any court on appeal therefrom to be entitled to receive compensation as provided in the Workmen's Compensation Law of the State of Oregon, then this policy shall be interpreted as having been extended to cover the liability of the Assured for such payments, upon condition, however, that the Assured shall pay an additional premium from the inception date of this policy for all employees engaged in the same class or type of operation as the injured or deceased employee which shall be computed at the rate set forth in the last published Schedule of Rates of the State Industrial Accident Commission.

12. The statements in Items 1 to 9 inclusive, in the Statements hereinafter contained, are warranted to be true: Those stated as estimates only are believed to be true. This Policy is issued in reliance upon such statements and in consideration of the provisions of the Policy respecting its premium and the payment of the premium in such Statements expressed.

AGREEMENT TWO IS ALSO SUBJECT TO THE FOLLOWING CONDITIONS:

13. The Underwriters shall not be obligated to pay compensation to any one if the Assured shall operate under the Workmen's Compensation Law of the State of Oregon during any time while this policy is in force.

14. The Underwriters shall not be obligated to pay compensation to the person entitled thereto unless and until such person shall have executed a compensation agreement which shall provide (a) for the payment of compensation as provided in the Workmen's Compensation Law of the State of Oregon: (b) for the designation of a certain doctor who shall determine the time of termination of total disability and the extent of permanent partial disability, if any: (c) for the arbitration by two duly licensed physicians and surgeons, one to be selected by the employee and the other by the Assured, and a third to be selected by the first two in the event they cannot agree, of any dispute relative to the termination of total disability and the extent of permanent partial disability: (d) for the payment by the Assured and the employee of the expense of their own arbitrators and the division of the expense of the third

arbitrator between them: and (e) for the release of all claims against the Assured and the Underwriters for such injuries and or death excepting only the obligation to make the payments provided in said compensation agreement.

15. The Underwriters shall not be obligated to pay compensation to the person entitled thereto if the injured employee or his legal representative shall have instituted or prosecuted any suit or action against the Assured to recover damages for the injuries or death for which compensation is sought to be recovered under this policy.

16. The Underwriters shall not be obligated to pay compensation to the person entitled thereto if the Assured and the Underwriters shall agree that such compensation should not be paid, and the Underwriters may withdraw any offer to pay compensation, without notice, at any time before acceptance of the offer by the person entitled thereto.

17. In the event that the injury or death of any employee for which compensation is payable hereunder is, in the opinion of the Underwriters, due to the negligence of some person or persons other than the Assured then such employee, his heirs or personal representatives, shall prosecute an action for damages against such person or persons at the expense and under the direction and control of the Underwriters and any recovery therein shall first be applied to the extinguishment of the obligation hereby assumed.

SECTION III—STATEMENTS

1. Name of Assured .....
   Address .....
   (Street, Town and State, where office is located)
   Individual, Co-partnership, Corporation or estate?
   .....

2. The Policy Period shall be from ..... 19 ..... to ..... 19 ..... at 12:01 A.M., Standard Time at Assured's address as to each of said dates.

3. The Underwriters' liability under this Policy—

   (A) As regards bodily injuries (fatal or non-fatal) from accident shall be limited to FIFTY THOUSAND DOLLARS ($50,000.00) for all claims arising out of injuries to or the death of one person from any one accident, and subject to that limit for each person, the Underwriters' total liability for all claims arising out of injuries to or the death to that for each person, the Underwriters' total liability for all claims arising out of injuries to or the death of more than one person from any one accident is limited to ONE HUNDRED THOUSAND DOLLARS ($100,000.00);

   (B) As regards bodily injuries (fatal or non-fatal) from occupational disease shall be limited to FIFTY THOUSAND DOLLARS ($50,000.00) for all claims arising out of the injury or death of one person, and subject to the same limit for each person, the Underwriters' total liability for

all claims arising out of injuries or deaths from occupational disease shall be limited to ONE HUNDRED THOUSAND DOLLARS ($100,000.00) for the entire policy period.

4. The locations, by State, Town or City, Street and Number, of all Factories, shops, yards, buildings, premises or other work places to which this Policy shall apply are as follows: .....

.....

In addition to the foregoing locations, this Policy shall also apply to such injuries so sustained elsewhere by employees engaged in the said trade, business or work, and not hereinafter excluded, when such employees are sent temporarily from the said locations to perform elsewhere their duties in connection with the operation or prosecution by the Assured of the trade, business or work insured hereunder.

5. The insurance afforded is only with respect to such and so many of the coverages as are indicated by a specific minimum permium charge.

Minimum Premium: $ .....

CLASSIFICATIONS	ESTIMATED PAY ROLL	RATE COMPENSATION	RATE O. C.	PREMIUM

6. The premium shall be computed, at the rates or rates specified in Statement 5, upon the entire remuneration of whatsoever kind earned during the Policy period by all employees engaged in or in connection with the business operations or work described in Statement 5, including drivers, drivers' helpers, chauffeur's helpers, loaders, material han-

dlers, pay clerks, timekeepers, salesmen, collectors, messengers, and clerical office force. If the Assured is a corporation the entire remuneration of the President, Vice-President, Secretary, Treasurer, and any other executive officers elected or appointed in accordance with the charter or by-laws of the corporation (subject to a maximum individual pay roll of $1,200 per annum for each such officer) shall be included in said computation at the premium rates applicable to their respective duties, provided that the entire pay roll so developed of each such executive officer who performs such duties as are ordinarily undertaken by a superintendent, foreman or workman, or who is directly responsible for the actual performance of any operation or operations of the risk, shall be assigned without division to the highest rated classification which describes any duties undertaken by such executive officer or any operation for the actual performance of which such executive officer is directly responsible. The entire pay roll so developed of all other executive officers shall be assigned without division to the classification which describes the actual operations in which such executive officers are primarily engaged. There shall be no exclusions from the said premium computation except as provided in Statement 7.

7. The following employees are specifically excluded from the Policy and from the premium computation

8. No explosives are or will be used in connect

with the work insured hereby, except as follows:

.....

9. No Insurer has cancelled or refused to issue or renew Employer's Liability, Elevator or Boiler insurance for this Assured during the past three years, except as follows: .....

.....

Attached to the forming part of Policy No. .....
Dated at Portland, Oregon, this ..... day of
..... 19 .....

RATHBONE, KING & SEELEY.
By .....

APPENDIX C

Appellate decisions subsequent to *Davis v. Department of Labor and Industries* holding the Longshoremen and Harbor Workers' Act applicable despite contention that state compensation law applicable:

Cleaning tank on barge out of water on marine railway.

Avondale Marine Ways v. Henderson, 346 US 366, 74 Sup. Ct. 100 (1953).

Repairing gate of drydock; prior state compensation award.

Newport News Shipbuilding & Drydock Co. v. O'Hearne, 192 F.2d 968 (CA 4th, 1951).

Repairing tugboat on marine railway; prior state compensation award.

Western Boat Building Co. v. O'Leary, 198 F.2d 409 (CA 9th, 1952).

One of "shore gang" who went on barge to shout to tug.

De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481 (CA 5th, 1944).

Constructing new drydock and water pumped out of river.

Travelers Ins. Co. v. McManigal, 139 F.2d 949 (CA 7th, 1944).

One of "shore gang" for dredge engaged in deepening channel; killed while leaving work via pontoon line.

Standard Dredging Corp. v. Henderson, 150 F.2d 78 (CA 5th, 1945).

Injured employee watchman-carpenter for laid up vessel—injured climbing on ladder from pontoon to ship.

Hillcone S. S. Co. v. Steffen, 136 F.2d 965 (CA 9th, 1943).

Welder making repairs on ocean-going tanker in drydock.

Flowers v. The Travelers Insurance Company, (CA 5th, July 15, 1958, No. 16654).

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DEC 5 1958
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM 1958

NO. 52

HARRY A HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITIONER'S REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM 1958

NO. 52

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITIONER'S REPLY BRIEF

ARGUMENT

In opening brief, petitioner pointed out the inexcusable and cold-blooded negligence of respondent resulting in petitioner's serious injury and incapacity (Pet. Br. 7, 17, 18). Respondent does not even attempt to deny or justify such conduct on its part. It only seeks to evade the consequences of Oregon law by attempting to hide behind the U. S. Constitution.

No Conflict with Federal Law

Basically, all respondent has to rely on is the doctrine in *Southern Pacific Co. v. Jensen*, 244 US 205, 37

S Ct 524, 61 L Ed 1086. But it seeks to elicit aid from such cases as:

> Pope & Talbot, Inc. v. Hawn, 346 US 406, 74 S Ct 202, 98 L Ed 143 (Resp. Br. 10).
>
> Garrett v. Moore-McCormack Co., 317 US 239, 63 S Ct 246, 87 L Ed 239 (Resp. Br. 12).
>
> McAllister v. Magnolia Petroleum Company, 357 US 221, 78 S Ct 1201 (Resp. Br. 14).

In each of those cases the employer attempted unsuccessfully to deprive the workman of federal rights by means of a restrictive state law at odds with applicable federal law. The gravamen of these cases seems to be as stated in the *Garrett* case (317 US at 245):

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law [citing *Erie Railroad Co. v. Tompkins*, 304 US 64]. And Admiralty Courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State [citing *Western Fuel Co. v. Garcia*, 257 US 233, 242. *The Hamilton*, 207 US 398, 404]. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."

There is no conflict here. We are not dealing with a state law that *restricts* federally created admiralty rights in an injured workman. To the contrary, the employee desires that state law apply.

The "twilight zone" rule as enunciated in the case of *Davis v. Department of Labor & Industries*, 317 US 249, 63 S Ct 225, 87 L Ed 246, is premised on the statement:

> "Prima facie, every state is entitled to enforce in its own courts its own statutes lawfully enacted." (317 US at 258.)

Where an injured workman is injured on navigable waters in an equivocal situation, he has a choice of state or federal remedy. Questioned state laws are presumed to be constitutional where the workman seeks state relief. Significantly, respondent, like the Oregon Supreme Court, chose not to discuss this presumption of constitutionality (Pet. Br. 16). There is here a presumption that the application of Oregon law (ORS 656.006, 656.024; Pet. Br. 29, 30) is constitutional.

Cases such as *Pope & Talbot* (346 US 406), *Garrett* (317 US 239), and *McAllister* (357 US 221) (all supra 2), are not at odds with the *Davis* case. It is noted the *Garrett* case was decided the same day as the *Davis* case, with both opinions authored by the same Justice.

The "Twilight Zone" Is Not Confined to Compensation Payments

Respondent argues that in the "twilight zone" the allowable state remedy is confined solely to pure compensation as such (Resp. Br. 22-26).

Respondent's expressed concern over the fate of the poor working man who cannot get compensation pro-

duces a hollow echo. It was the sole and exclusive act of respondent that deprived all of its workers of state compensation, whether amphibious or strictly land based. Now respondent wants to deprive petitioner of his substitute remedy because it will be cruel not to give him compensation!

Respondent (Resp. Br. 23, 24) seeks comfort in the words of the Longshoremen's Act:

> " * * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law," [33 USC 903(a); Pet. Br. 27.]

Oregon does validly provide compensation per the *Davis* line of cases. Only employers such as respondent who chose not to allow their employees to enjoy it must face the actual consequences of their negligence.

Petitioner quotes at length from Gilmore and Black, "The Law of Admiralty" (Resp. Br. 24, 25), wherein the authors speculate on the absence of a "twilight zone" between a compensation proceeding on one hand and an action under the FELA, the Jones Act or maritime law on the other. The authors suggest there is a difference between choosing between two compensation statutes, and choosing between a compensation statute and a court action. They are referring (p. 356) to cases such as *Penn. Railroad Co. v. O'Rourke*, 344 US 334, 73 S Ct 302, 97 L Ed 367.

This point was covered in petitioner's opening brief (19, 20). Obviously the authors' reasoning does not carry to this case. Here the employer can fully protect

itself from an action for negligence anytime it so chooses by signifying its intent to comply with the compensation act (ORS 656.028; Pet. Br. 30).

"Twilight Zone" Doctrine Has Not Been Overruled

But more basically, the quotation from Gilmore and Black is inapropos, for cases such as *O'Rourke* involve wholly different questions than exist here (Pet. Br. 20) The *O'Rourke* case involved only the interpretation and construction of two federal statutes. There was no constitutional question (Footnote 8, 344 US at 341). The court clearly pointed out the same basic distinction in *Norton v. Warner* (Footnote 3, 321 US 565, 569).—The instant case involves only a constitutional question. Statutory construction is not involved.

Respondent seems to argue nevertheless that the *Davis, Baskin* [*Baskin v. Industrial Accident Commission* 338 US 854, 70 S Ct 99, 94 L Ed 523 (89 Cal App 2d 632, 201 P2d 549) (sub nom *Kaiser Co. v. Baskin*), 340 US 886, 71 S Ct 208, 95 L Ed 643 (97 Cal App 2d 257, 217 P2d 733)] and *Moores* [Moores' Case (sub nom *Bethlehem Steel Co. v. Moores*), 335 US 874, 69 S Ct 233, 93 L Ed 417 (323 Mass 462, 80 NE 2d 478)] cases have been "overruled" by language in the *O'Rourke* case (Resp. Br. 20, 21).

It seems obvious why this court said New Jersey could not have enacted statutes granting compensation for this brakeman on navigable waters (344 US at 337). He was working for an interstate railroad. No state could cover such a worker with compensation anywhere:

Erie Railroad Co v. Winfield, 244 US 170, 37 S Ct 556, 61 L Ed 1057.
Scrinko v. Reading Co. (DC NJ), 117 F Supp 603, 609.

The court was merely fitting the injured brakeman into the language of the Longshoremen's Act [33 USC 903(a)] to show he was covered thereby. This was done preparatory to holding that as a matter of statutory construction, the Longshoremen's Act was, by its terms, the exclusive remedy where another *federal* act was also involved.

If respondent's interpretation of this language is accepted, the *Davis, Moore* and *Baskin* cases are out. Obviously, before any "twilight zone" question can arise, a condition precedent must be an injury on navigable waters.

Not long after the *O'Rourke* decision this court cited *Davis, Moores* and *Baskin* cases as authority for its action in the case of *Avondale Marine Ways v. Henderson*, 346 US 366, 98 L Ed 77, 74 S Ct 100.

An example of the misconception of the *O'Rourke* language is *Green v. Simpson & Brown Const. Co.*, 14 N.J. 66, 71, 101 A2d 10.

The court in *Flowers v. Travelers Insurance Company* (CCA 5), 258 F2d 220 at 223, 224, appears to have equally misconstrued the *O'Rourke* case. Here the Fifth Circuit follows generally the language of *De Bardeleben Coal Corp. v. Henderson* (CCA 5), 142 F2d 481. The Fifth Circuit, like the Oregon Supreme Court (Pet. Br. 21), appears not to like the *Davis* solution.—Other

cases cited by respondent in Appendix "C" (48), whatever the language, nevertheless achieve the "twilight zone" solution by allowing to the workman his choice of remedy between state and federal law.

No Uniformity of Maritime Law Problem

Respondent argues the standard of care provided by the Oregon Employers' Liability Act is inimical to maritime law (Resp. Br. 27-30).

It is incongruous that respondent's whole argument must be bottomed exclusively on the *Jensen* philosophy. That case dealt with a state compensation statute. Yet, respondent readily agrees that a state compensation statute may now constitutionally be applied in the "twilight zone." There is no higher standard of care existent than under a compensation statute—liability without fault. When respondent rejected the Oregon Act, it actually subjected itself to a *lesser* standard of care—not a higher one. The Oregon Supreme Court states it as follows in *Shelton v. Paris*, 199 Or 365, 369, (261 P2d 856).

> "Employers not operating under the Workmen's Compensation Act in this state are not insurers. 'They are liable for consequences, not of danger, but of negligence. * * *'; * * *; and if engaged in a hazardous occupation, as in this case, they are deprived of certain defenses."

Furthermore, it is difficult to envision greatly higher standards of care than exist in maritime situations such as the doctrine of unseaworthiness and under the Jones Act. Some recent decisions of this court along this gen-

eral line, with particular note as to the standard of care and type of employment are:

Seas Shipping Co. v. Sieracki, 328 US 85, 66 S Ct 872, 90 L Ed 1099;

Pope & Talbot, Inc. v. Hawn, 346 US 406, 74 S Ct 202, 98 L Ed 143;

Alaska S. S. Co. v. Petterson, 347 US 396, 74 S Ct 601, 98 L Ed 798;

Senko v. LaCrosse Dredging Corp., 352 US 370, 77 S Ct 415, 1 L Ed 2d 404;

Butler v. Whiteman, 356 US 271, 2 L Ed 2d 754, reversing per curiam sub nom *Harris v. Whiteman*, 243 F2d 563 (CCA 5);

Grimes v. Raymond Concrete Pile Co., 356 US 252, 2 L Ed 2d 737, reversing per curiam 245 F2d 437 (CCA 1).

Language in cases such as *Hess v. U. S.*, 259 F2d 285 (CCA 9), quoted by respondent (Resp. Br. 28) thus appears unrealistic and hypertechnical.

Furthermore, the *Hess* case involved an attempted third party action against the United States—not the employer. Finding of Fact No. 29 of the trial court was that the Oregon State Industrial Accident Commission was paying compensation to the beneficiaries of decedents, indicating a practical and humane application of the "twilight zone" doctrine by the Commission. It is not a situation, as here, where the employer attempted to deprive his workers of all state relief by rejecting the Act.

Petitioner Clearly a "Twilight Zone" Employee

Respondent then argues this case falls outside the "twilight zone" because:

1. Petitioner's usual duties were exclusively on water (Resp. Br. 18).

Respondent fails to mention such cases as *Mark v. Portland Gravel Co.*, 130 Or 11, 278 P 986 (1929), where, long before the *Davis* decision, and during the height of the *Jensen* case, courts held that commercial dredging on navigable waters was outside admiralty jurisdiction. Petitioner's usual and regular duties consisted solely of commercial dredging (Pet. Br. 4-6).

See 2 Schneider Workmen's Compensation, Perm. Ed. § 247, p. 23 (1942) (written before the *Davis* decision).

2. At the time of injury petitioner was helping load respondent's hopper (Resp. Br. 19).

In the *Davis* case, the injured workman was loading steel on a barge on navigable waters. This was Davis' regular job. Here loading was not Hahn's regular job. The language used by respondent in its brief (18, 19, 21) to describe petitioner's work is reminiscent of that used by the Washington Supreme Court in characterizing the work of *Davis* (12 Wn 2d 349 at 353, 354, 121 P2d 365, 366, 367).

3. Respondent attempts to pose petitioner as a longshoreman, and itself as a ship and barge hauler (Resp. Br. 18, 19).

Petitioner was an "oiler" on a dredge bringing up gravel from respondent's private lagoon, for commercial sale by respondent. Respondent was, as its name implies, a sand and gravel merchant; with a lucrative side

line of renting space in its lagoon for parking log rafts (Pet. Br. 4-6).

Even in the "local concern" days, during the zenith of the *Jensen* case, this case would be one earmarked for state law.

Sound Policy Requires That Petitioner Be Allowed to Maintain This Action

Petitioner in opening brief pointed out the large number of "twilight zone" employees over the country adversely affected by this decision, particularly in elective compensation states (Pet. Br. 11-13).

Petitioner also showed the harmful consequences and illogic of allowing an employer to completely escape responsibility under state law to injured employees by the device and expedient of rejecting the state act (Pet. Br. 21-24).

Respondent apparently recognizes the untenable nature of its insistence that it can unilaterally deny all state remedy to its employees. As a consequence, it goes completely outside of the record of the case in a futile attempt to justify itself.

Respondent sets out in 14 pages (Appendix "B", 34-47) what it denominates a "standard" policy of private insurance. It then seems to insinuate and hope that this court will suspect it carried such a policy on its employees at the time of this injury, and that all rejecting employers do the same. There is not a shred of substantiating evidence in the record.

This is the second time respondent has seen fit to

bring up this matter in this court *dehors* the record (see Brief in opposition to petition for a writ of certiorari, 4; and petitioner's reply thereto, 2). There is no evidence of such policy, that petitioner was ever told about such a policy, or offered any benefits thereunder.

Normally the best method of handling an argument based on matter *dehors* the record is to ignore it. However, here respondent would have this court believe that such policy contains the equivalent of workmen's compensation benefits in Oregon. So outrageous is this insinuation that we must point out some glaring differences.

To begin with, such policy has no standing whatever. The preface to "Annotated Laws Relating to the State Industrial Accident Commission With 1957 Amendments," published by the Oregon State Industrial Accident Commission, states at page 5:

> "Employers rejecting the law by electing not to contribute are deprived of common law defenses and may not defeat damage actions by their workmen where the workman is negligent, where a fellow workman is negligent or where the workman knowingly exposes himself to danger. The rejected employer is subject to the Employer's Liability Act and is liable for injuries chargeable to him without limit on the amount of damages. Private carriers write liability policies against such risks but *the law recognizes no private workmen's compensation insurance as such in Oregon.*" (Emphasis added.)

Paragraph 16 (Resp. Br. 43) well illustrates the quality of such a policy.—A simple agreement between the insurer and employer cuts off an injured employee, after injury, without one cent. This may be done even after

an offer has been made the employee. *The employee has no standing to even protest!* What a whip to coerce acceptance of an unpalatable and inadequate offer! No employee could ever count on any benefits, however serious and permanent his injury might be.

Further comparisons are illuminating:

1. The policy can be cancelled by insurer or employer anytime on ten days' notice, Provision 5 (Resp. Br. 39).—Under the Act, employees of all employers in hazardous occupations not rejecting the Act are automatically covered by compensation, even where employers are in default on payments to the Commission. Coverage can never be cancelled by the State (ORS 656.314).

2. The insurance is in excess of all other insurance carried by employer, Provision 9 (Resp. Br. 40). This can readily involve injured employee in jurisdictional warfare between companies resulting in delay and uncertainty—assuming the employer and insurer haven't already decided he gets none anyhow under Provision 16.

3. Arbitration required in case of dispute on extent of disability, with half the cost to employee, Provision 14 (Resp. Br. 42).—ORS 656.288 grants the employee trial by jury in case of dispute at no cost, and such cases have priority over all other civil cases. (ORS 656.324 grants the same priority in actions such as this case against rejecting employers, thus preventing delay).

4. Employee must give full release. Otherwise he receives no benefits, Provision 14(e) (Resp. Br. 43).—

Under workmen's compensation, benefits are paid and no rights are released (ORS 656.202).

5. The policy provides nothing for aggravation—ORS 656.276 gives the workman two years to show he is entitled to increased compensation. The following is apropos from the preface to "Annotated Laws Relating to the State Industrial Accident Commission With 1957 Amendments," published by the Oregon Commission (supra), at page 5:

> "The Commission has continuing jurisdiction and the right to file claim for aggravation obviates the evils of systems where acceptance of benefits or signing a release forever closes the door. Benefits provided by the Oregon Law are now among the most liberal in the United States."

6. The insurance company, upon recovery from a negligent third party, keeps everything up to the amount paid in benefits, Provision 17 (Resp. Br. 43).—ORS 656.322 grants a portion of the recovery to the employee.

7. The policy carries limitation of liability of $100,000 for one accident (Resp. Br. 44). (In *Pease v. Roseburg Lumber Co.*, 206 Or 658, 294 P2d 346, under a similar "standard" policy, it was $5,000). In the event of a catastrophe the policy could not cover all losses (e.g., *King v. State Industrial Accident Commission,* 211 Or 40, 309 P2d 159—four fatalities).—The Oregon Act carries unlimited total benefits (ORS 656.204-656.210).

8. The policy carries a limitation of $100,000 for occupational disease over the entire policy period (Resp. Br. 45)—under Oregon law, no limitation.

The Oregon court in *Whitehead v. Montgomery Ward*, 194 Or 106 at 130, 239 P2d 226 (1952), unfavorably compared some of the provisions of one of these policies with the Oregon Act. Significantly, respondent did not cite this rather recent case in its brief.

Workmen's compensation benefits under well administered state laws are meager enough at best:

> Richter & Forer, 36 Cornell Law Quarterly 203, 214;
>
> Samuel B. Horowitz, 5 NACCA Law Journal 11-17 (Mr. Horowitz was quoted by respondent in its brief at page 24);
>
> Arthur Larson, Undersecretary of Labor, "Model T" Compensation Acts in the Atomic Age, 18 NACCA Law Journal 39.

The comment of Amicus Curiae that the provisions of such policies are a "closely guarded secret" is fully understandable (Amicus Curiae Br. 3). Also understandable is why this case has gone on for three years and into three courts before this policy was mentioned for the first time.

* * * * *

Respondent attempts to disparage petitioner for bringing this action, and suggests he could always have obtained Longshoreman's benefits (Resp. Br. 21, 26). Certainly there is no reason to suppose that respondent will not fight the payment of such benefits exactly the same as respondent has litigated this case. The ingenuity of employers in frustrating recovery, whatever remedy an injured employee may seek, has been amply demonstrated. That was one big and impelling reason for the "twilight zone" doctrine (*Davis* case, 317 US at 253, 254).

There are several thousand miles of navigable waters in Oregon (Snake, Columbia, Willamette Rivers; the Pacific Ocean with its many coastal rivers and streams). Many other states are comparable. Hundreds of employers engage in hazardous local and "twilight zone" activities along these waters. Many, like respondent, are willing and anxious to escape the cost of providing state compensation for their employees. The only thing keeping them in line is fear of actions of this type under ORS 656.006 and ORS 656.024. If these employers can totally escape state responsibility for injuries to their employees by rejecting the Act, the consequences are apt to be devastating to many workers—amphibious and particularly land based. Thus the still large ranks of uncovered workers will expand rather than lessen (Pet. Br. 12).

This employer deliberately rejected the compensation Act. If elective compensation acts are to have any vigor, respondent must be forced to abide by its election to accept liability for its negligence. It is inconceivable that the Constitution could sanction recovery of workmen's compensation in the "twilight zone," but forbid recovery of compensation for inexcusable negligence under these circumstances.

CONCLUSION

For the reasons stated herein and in opening brief, it is respectfully submitted that the judgment of the Court below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 52

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

SUPPLEMENTAL BRIEF OF RESPONDENT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

SUPPLEMENTAL BRIEF OF RESPONDENT

Supplemental Brief on Points No. 3 ("The 'twilight zone' cannot be expanded to include cases of this type") and No. 4 ("The facts of this accident do not place it wthin the 'twilight zone' ") of re-pondent's argument.

Flowers v. The Travelers Insurance Company, 258 F.2d 220 (CCA 5th, July 15, 1958). As gathered from the opinion, the facts in this case were that "Flowers was injured while performing duties as a welder in making repairs on the SS REDSTONE, a large ocean-going tanker. The vessel was in floating drydock in Todd Shipyard in Galveston Harbor. * * * His (Flowers)

presence on board the ship, actively working as a welder, essential to the making of essential repairs, was nonetheless maritime even though 80% of his work was generally ashore in the plate department of the Shipyard. The nonmaritime nature of the so-called regular work or duties is completely irrelevant."

The Texas Industrial Accident Commission rejected a claim made under the Texas Act. Statutory appeal permitted a trial de novo which was removed to the Federal Court on diversity.

Judge Brown, speaking for the Court, stated:

"We speak of them (*Bethlehem Steel Co. v. Moore*, 335 U.S. 874, 69 S. Ct. 239, and *Baskin vs. Industrial Accident Commission*, 338 U.S. 854, 70 S. Ct. 99) in this figure neither to disparage them nor to avoid their authoritative force, if, and to whatever extent, they are applicable. But we, with others, and perhaps the court itself, see in these actions either uncertainty, if not now then assuredly in the making, and an accentuated instability in the every day administration of compensation acts to amphibious employees if these are thought to throw down the bars in complete disregard of the philosophy expressed in *Parker v. Motor Boat Sales, Inc.*, supra, and to this date not repudiated that Congress meant to draw the line where *Jensen* left it. * * *

"We think that the court by subsequent action has made it quite plain that it had no such revolutionary purposes in mind. *Pennsylvania R. R. Co. v. O'Rourke*, 344 U.S. 334, 73 S. Ct. 302, has, in our judgment, been given altogether too little attention. * * *

"It added the further and entirely new concept that where coverage of Section 903(a) is applicable, the exclusive liability of Section 905 does not de-

pend on the nature or character of the work being done by the injured employee so long as (1) that injury occurs on navigable waters and (2) the employer is such a person '*any* of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any drydock).' Sec. 904(4)."

The Court further stated:

"If, as some suggest, literal application of *Moore's* and *Baskin* means that all is either twilight or may be made so by the injured employee, the carefully devised machinery for the orderly, routine processing of compensation benefits under the Longshoremen's Act will either be wrecked by continual tinkering of State agencies or will fall into a state of disrepair from neglect and nonuse."

The Court finally concluded:

"What has happened in Texas and Louisiana may soon occur amongst the maritime workers of Mississippi, Florida and Georgia. If with no marginal employment, no obscurity concerning the nature and kind of work or its importance to maritime commerce, no undefined or undefinable boundaries to set it apart from land-based activity, it is nontheless left entirely to the choice of the injured employee to determine which route he will take, then *Jensen* has indeed lost its vitality, the *Jensen* line of demarkation, reaffirmed in *Parker*, has been overruled, and administrative finality, emphasized in *Davis* is just so much makeweight. When the destructive consequences are so rife, when thirty years' experience in the operation of the Longshoremen's Act would be disturbed by introducing uncertainty and confusion where, as to these two fields of ship repairmen and longshoremen, there is Federal assurance in the everyday administration of the Act, we decline to hold that the Court had such portentous purposes for Moore's or Baskin.

"The outlines of a case of an injury received on navigable waters while engaged in essential repairs to an existing vessel have long been clear and distinct. As to them, there was no twilight. *Moore's* and *Baskin* were devised to solve cases in, not to create, the twilight. The District Judge was right in holding that the Texas Act could not apply and that this was a case for the exclusive application of the Federal Act."

Respectfully submitted,

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FILE COPY

No. 52

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In the Supreme Court
of the United States

OCTOBER TERM, 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

RESPONDENT'S PETITION FOR REHEARING OF DECISION

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In the Supreme Court
of the United States

OCTOBER TERM, 1958

HARRY A. HAHN,

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v.

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On Writ of Certiorari to the Supreme Court of the State of Oregon.

RESPONDENT'S PETITION FOR REHEARING OF DECISION

The respondent respectfully submits that this Court erred in its decision in this case, first, in defining the boundary of the "twilight zone" and, second, in extending the "twilight zone" beyond workmen's compensation proceedings, and that these errors will add to the utter confusion now existent in state and federal courts and among counsel for injured workmen, employers and insurance carriers and, therefore, this Court should set aside its decision and grant a rehearing.

ARGUMENT

I.

This Court erred in defining the boundaries of the "twilight zone."

The opinion of this Court states that the "twilight zone" is that area in which "a workers injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limits of *Southern Pacific Co. vs. Jensen*, 244 U.S. 205." *Davis vs. Department of Labor*, 317 U.S. 249, is cited for this proposition. A paraphrasing of the above quotation is,—if the injury is maritime but local, state compensation benefits can be secured. There is no question, that is accepted as the law, but that law was announced in 1921 in *Western Fuel Co. vs. Garcia*, 257 U.S. 233, 42 S. Ct. 89, and in 1922 in *Grant-Smith-Porter vs. Rohde*, 257 U.S. 549, 42 S. Ct. 157, seven and six years before the Longshoremen's & Harbor Worker's Act was enacted. If maritime but local was the thesis of *Davis*, then Mrs. Davis could have been awarded Washington State compensation on the basis of *Grant-Smith-Porter Co.*, and the balance of the Court's decision in *Davis* must be interpreted as meaning that for a maritime but local injury, one can obtain federal compensation as well as state compensation.

Pursuant to this language in the present decision the old question is again, whether "a worker's injury occurred in an operation which, although maritime in nature was so 'local' as to allow state compensation laws validly

to apply under the limits of *Southern Pacific vs. Jensen* (citation)." Must the old search be renewed? Is it maritime but local? If it is one may obtain either federal or state compensation. If it is only maritime and not local, only federal compensation can be secured. Are cases prior to *Davis* still the criteria for maritime but local? Is there a new test? Must the boundary again be punched out, injury by injury, case by case?

The Court here stated:

> "It seems plain enough that petitioner's injury occurred in the 'twilight zone'."

Reading this in connection with the Court's definition of "twilight zone", it is apparently plain to the Court that this injury was maritime but local. What makes it "plain"? At the time of his injury, petitioner was on a barge loading interstate cargo. Is this an example of an operation that is plainly local? This was not as "plain" to the Oregon Court in *Martinson vs. State Industrial Accident Commission*, 154 Ore. 423, 60 P.2d 972 (1936); or the Court of Appeals for the Ninth Circuit in *Chappell vs. C. D. Johnson Lumber Corp.*, 216 F.2d 873 (1954). Both of these Courts thought that loading a barge was a purely maritime matter and not one of local concern.

There must be some substantial reason why petitioner's injury here is plainly a matter of local concern, but on the other hand, a janitor riding in a motor boat is engaged in a "clearly maritime activity"; *Parker vs. Motor Boat Sales*, 314 U.S. 244, 62 S. Ct. 221. The difference cannot be because of the general and usual em-

ployment of the two employees. The Court in *Parker* held that the general or usual employment was immaterial; it was what the employee was doing at the time of injury that counted. However, even if that is no longer the test, the petitioner's general and usual employment here was all on navigable water; on a barge. His employment was propelling or moving a barge. Under this Court's decisions in *Grimes vs. Raymond Concrete Pile Co.,* 78 S. Ct. 687, and *Senko vs. LaCross Dredging Co.,* 352 U.S. 70, 77 S. Ct. 415, it would appear, had Hahn chosen, that Hahn could have gone to the jury under the Jones Act on the premise that he was a member of the crew of a vessel.

If it is so "plain" that petitioner's injury occurred in an operation maritime but local, this Court must have some track marked through the growing labyrinth of admiralty versus local growth, the blazes for which will guide the unknowing toward the light. It would be of inestimable assistance to have a few of the guide posts revealed.

II.

This Court erred in holding the "twilight zone" applicable to a damage action.

This Court stated:

> "Since this case is within the 'twilight zone', it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery."

With all due respect, it appears to the respondent that this Court is thereby stating,—the illogical premise of *Davis* must be logically followed.

Congress in the longshoremen's Act provided that compensation under the Act was payable:

> "Only * * * if recovery * * * through workmen's compensation proceedings may not validly be provided by state law."

It appears quite obvious from this language that Congress intended mutually exclusive remedies. However, this Court in *Davis*, for the stated purpose of correcting uncertainty in the field of workmen's compensation, decided contrary to the statute, and created concurrent remedies. The Court in *Davis* thought necessity justified an illogical decision contrary to a Congressional Act. Here the necessity is absent. A certain compensation remedy is and always was available to Harry Hahn. Neither experience, necessity nor logic can support a further departure from the clear intent of Congress.

It is respectfully submitted that this Court is in error and that such error will compound the confusion now existent unless the decision in this case is set aside and this petition for rehearing granted.

Respectfully submitted,

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STATE OF OREGON)
) ss.
County of Multnomah)

I, Arno H. Denecke, of attorneys for Petitioner do hereby certify that the foregoing petition for rehearing is presented in good faith and is not interposed for the purposes of delay.

ARNO H. DENECKE

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1958.

Harry A. Hahn, Petitioner, v. Ross Island Sand & Gravel Co., a Corporation.	On Writ of Certiorari to the Supreme Court of Oregon.

[January 12, 1959.]

Per Curiam.

By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply "if recovery for the disability or death through workmen's compensation proceedings *may . . . validly be provided by State law.*" § 3, 44 Stat. 1426, 33 U. S. C. § 903 (a) (emphasis supplied). In *Davis* v. *Department of Labor*, 317 U. S. 249, we recognized that in some cases it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so "local" as to allow state compensation laws validly to apply under the limitations of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. As to cases within this "twilight zone," *Davis*, in effect, gave an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State in which the injury occurred. It seems plain enough that petitioner's injury occurred in the "twilight zone," and that recovery for it "through workmen's compensation proceedings," could have been, and in fact was, validly "provided by State law"—the Oregon Workmen's Compensation Act. Ore. Rev. Stat. §§ 656.002–656.990. Therefore, the Longshoremen's Act did not bar petitioner's claim under state law. But since his employer had elected to reject them the automatic compensation provisions of the Oregon Workmen's Com-

pensation Act did not apply to the claim. Section 656.024 of that law provides, however, that when an employer has elected to reject the Act's automatic compensation provisions his injured employee may maintain in the courts a negligence action for damages. Of course, the employee could not do this if the case were not within the "twilight zone," for then the Longshoremen's Act would provide the exclusive remedy. Since this case is within the "twilight zone," it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery.

The judgment is reversed and the cause is remanded to the Supreme Court of Oregon for proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1958.

Harry A. Hahn, Petitioner,
v.
Ross Island Sand & Gravel Co., a Corporation.

On Writ of Certiorari to the Supreme Court of Oregon.

[January 12, 1959.]

Mr. Justice Stewart, whom Mr. Justice Harlan joins, dissenting.

This case poses a difficult and important issue of first impression. The Court decides it, I think, incorrectly.

The petitioner was injured while working on a barge in navigable waters within the State of Oregon. The respondent employer had secured payment of compensation under the Longshoremen's and Harbor Workers Compensation Act, 33 U. S. C. § 901 *et seq.*, but had elected not to be covered by the Oregon Workmen's Compensation Law, Ore. Rev. Stat. § 656.002 *et seq.* Compensation benefits under the federal statute were clearly available at all times to the petitioner. Instead of accepting these benefits, however, he brought an action for personal injuries in an Oregon state court, the Oregon statute permitting such an action against an employer not participating in the state workmen's compensation plan.[1]

The trial court entered judgment for the employer, notwithstanding a jury award in the petitioner's favor, and the judgment was affirmed by the Oregon Supreme

[1] The employer in such a case is deprived of the traditional common-law defenses. Ore. Rev. Stat. § 656.024.

Court, which held that the petitioner's sole remedy was under the federal statute. 66 Oregon Advance Sheets 117, 320 P. 2d 668. It is that decision which is today reversed.

The creation in *Davis* v. *Department of Labor* of a "twilight zone" was a practical solution to a practical problem, a problem stemming from *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and one which 25 years of post-*Jensen* history had failed to solve. The problem was how to assure to injured waterfront employees the simple, prompt, and certain protection of workmen's compensation which Congress had clearly intended to give in enacting the federal statute. See 317 U. S., at 254. The *Davis* decision in effect told the injured employee that in a doubtful case he would be assured of workmen's compensation whether he proceeded under a state workmen's compensation act or the federal statute. See *Moores's Case*, 323 Mass. 162, 80 N. E. 2d 478, aff'd *per curiam, sub nom. Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874.

Even accepting the premise that the circumstances surrounding Hahn's accident brought it within the twilight zone, no one had supposed until today that either *Davis* or the federal statute allowed an employee to spurn federal compensation and submit his claim to a state court jury.[2] *Chappell* v. *C. D. Johnson Lumber Corp.*, 112 F. Supp. 625, reversed on other grounds, 216 F. 2d 873.

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[2] The pertinent provision of 33 U. S. C. § 903 (a) is as follows: "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death *through workmen's compensation proceedings* may not validly be provided by State law." (Emphasis added.)

In the interest of a clear legislative purpose to provide the certainty and security of workmen's compensation, the "illogic" of a twilight zone was permitted.[3] Such illogic should not be utilized to frustrate that very purpose. I would affirm the judgment.

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[3] The twilight zone and its background have been much criticized and discussed. For summaries, see Gilmore and Black, The Law of Admiralty (1957), § 6-48; 2 Larson, The Law of Workmen's Compensation (1952), § 89.00 *et seq.*; Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637 (1955).